IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 63.

CHARLES H. UTERMEHLE, PLAINTIFF IN ERROR,

vs.

MAMIE E. NORMENT ET AL., DEFENDANTS IN ERROR.

Brief of Caveator and Plaintiff in Error.

Statement of Case.

This is a writ of error to the Court of Appeals of the District of Columbia seeking the review of a decree of that court, affirming a decree of the Supreme Court of the District of Columbia, holding a special term for probate business, entered on the 7th day of April, A. D. 1902, admitting to probate and record a paper writing as the will of George W. Utermehle, dated the 7th day of December, A. D. 1887, as a will of real property, and confirming a former decree of the court of February 26, A. D. 1889, which admitted the will to probate as a will of personality (Rec. p. 43).

On the 16th day of April, A. D. 1889, one George W. Utermehle departed this life in the city of Washington, District of Columbia, leaving a large estate of both personal and real property—real property of the value of

$1,000,000, with a rental of $55,000 per year (Rec. p. 118), and personal property estimated to amount to about $600,000.

He left surviving him his widow, Sarah Utermehle; Rose M. Taylor, a daughter; Mamie E. Norment, a daughter, and Charles H. Utermehle, a grandson, the latter being the only child of Charles H. Utermehle, deceased, who was the only son of George W. Utermehle. Said George W. Utermehle left a paper-writing, purporting to be his last will and testament (Rec. p. 116), in and by which he made certain bequests to his nieces, and then devised to his grandson, Charles H. Utermehle, in fee simple, the property known as the "Young Law Building," and also the interest due and to become due on a certain $750 note alleged to be in his possession. All the rest and residue of his personal property, as well as square No. 765, the house in which he lived, he devised and bequeathed to his wife, and the balance of his real estate was devised unto his two daughters, Mamie E. Norment, wife of Samuel Norment, and Rosa Taylor, wife of Dr. Leroy M. Taylor, their heirs and assigns. His widow, Sarah Utermehle, was appointed sole executrix under the will.

The alleged will was produced in court, after the death of George W. Utermehle, by Samuel Norment and Leroy M. Taylor, who, on April 23, 1899, made oath that they received the same from the executrix after it had been opened and read in the presence of the family of the testator (Rec. p. 117).

A petition was filed in the probate court by the executrix asking that the will be admitted to probate, and on April 26, A. D. 1889, the alleged will was admitted to probate (Rec. p. 2), and letters testamentary granted thereon. Special bond having been given by the executrix on April 14, 1890 (Rec. p. 4), a paper purporting to be a sworn paper in lieu of an account was filed, appended to which was a receipt of C. H. Utermehle for $2,116.80 in full of the note

of $750 with interest. On June 9, 1900 (Rec. p. 5), a caveat was filed by the plaintiff in error, Charles H. Utermehle, to said alleged will, attacking the mental capacity of George W. Utermehle, and alleging that he was not of sound and disposing mind and capable of executing a valid deed or contract at the time that the said alleged will was made. The caveat also charged that the alleged will was obtained by the undue influence of and through the fraud and coercion of Rose M. Taylor and Leroy M. Taylor, Sr., or one of them, or by some other person or persons to the petitioner unknown. The caveat then prayed that the former probate of the will as a will of personalty be set aside, and that appropriate issues be framed to determine the allegations of fact as to the validity of the paper-writing.

To this caveat Rose M. Taylor and Mamie E. Norment, on July 19, 1900 (Rec. p. 7), filed an answer, taking issue with the allegations contained in the caveat, and setting up certain alleged facts which they claimed estopped the plaintiff in error, Charles H. Utermehle, from disputing in this or any other proceeding the validity of the paper-writing alleged to be the last will and testament of George W. Utermehle.

As such matter of estoppel, they urge the probating of the will as to personal property and the granting of letters of administration, concerning which, it is alleged, Charles H. Utermehle was advised and had signed a waiver of citation, consenting that the court might act without further notice to him. They further rely upon the taking of the devise and bequest to Charles H. Utermehle under the will, and allege that he held the real property until March 24, 1891, when he sold and conveyed the same; and that he demanded and received the payment of the legacy mentioned in the will; that under the will of his grandmother, he also took a one-third interest in the personalty and realty which was devised to her by the will of George W. Utermehle. Section 10 of the act of Congress of June 8, 1898, is

also relied upon as a bar to the further prosecution of the caveat.

On the same day there was filed (Rec. p. 11) by said respondents a petition to admit the said will of George W. Utermehle to probate as a will of real property, which recites substantially the same facts as are set up in the answer, as far as the acts of the plaintiff in error are concerned, and it is prayed that the paper-writing be admitted to probate as a will of real property, and that a summons be issued to the plaintiff in error requiring him to show cause, if any he have, why the last named paper should not be admitted to probate and record as a will of real property.

On September 17, 1900 (Rec. p. 17) Charles H. Utermehle, *answering* the citation requiring him to show cause why the alleged will should not be admitted to probate as a will of real property, which was issued on the petition filed July 19, 1900, as above set forth, filed another caveat to said will in which he set up substantially the same grounds against the validity of the will as in the first caveat, that is, mental incapacity and undue influence. On September 27, 1900 (Rec. p. 19), an answer was filed to this caveat in which section 10 of the act of Congress of June 18, 1898, was again set up as a bar, and the waiver of citation to the original will was also referred to therein and a copy thereof set out. (Rec. p. 21)

On November 3, 1900 (Rec. p. 22), Charles H. Utermehle filed an answer to so much of the petition filed on the 19th day of July, A. D. 1900, as avers certain alleged facts relied upon as constituting an estoppel against the filing by him of any caveat to the alleged will. In this answer, which is somewhat lengthy, appellant avers that the paper-writing has never been admitted to probate or rendered valid in any way as to real property, and he asserts that it is not a valid will or testament of either real or personal property; that its validity has been attacked by two caveats filed by him, which fully set out his objections thereto, and

that certain property was pretended to be thereby devised and bequeathed to him, but—

> "*that not knowing his rights at the time, and having been misled and basely deceived as to his rights, and as to what he might expect, by misrepresentations made by the the petitioner, Rose M. Taylor, in the presence of and acquiesced in by the petitioner, Mamie E. Norment, and being also under a misapprehension and ignorant as to the real circumstances surrounding the alleged execution of said paper-writing, which circumstances he has been advised and believes and therefore avers, render said paper-writing null and void as a testamentary document, he did take said piece or parcel of ground and premises and did, under such circumstances and so believing, make sale thereof to satisfy his urgent needs; but, on or about the 19th day of May, A. D. 1900, having discovered the misrepresentations and fraud practiced upon him by the petitioners, and being, through divers persons, apprised for the first time of the true and infirm mental and physical condition of his grandfather at the time of the supposed execution of such will, and just learning also of the undue influence practiced upon deceased by the petitioner, Rose M. Taylor, and her husband, to secure the will in question; and of the fact, as disclosed to him for the first time through the medium of testimony given by both Rose M. Taylor and her husband, Leroy M. Taylor, in certain equity suits, that said parties had practically dictated and controlled both the actions and business of George W. Uttermehle during the last three years of his life, and that during said time deceased had been under their control and was habitually intoxicated and drunk through the excessive use of alcoholic stimulants, and respondent, having then for the first time consulted counsel as to his position and rights, and being for the first time made aware thereof, he at once advised petitioners of this discovery by sending them each a statement to that effect, and, having arranged to obtain the property comprised in said alleged devise, he forthwith informed petitioners, by letters sent to each of them on or about the 19th day of May, A. D. 1900, that he had been under a misapprehension*

and was ignorant regarding his rights, and had also been misled by misrepresentations made by those interested under said alleged will; that he had now been advised for the first time of what were his rights, and that said paper writing, which had never been probated as to real property or become operative as a will of such, was, in fact, invalid, and ought not to be held of any legal effect; wherefore that he had as a matter of fact only taken a one-third interest as tenant in common with the petitioners in the intended devise in question, and tendered himself ready to account to them for their two-thirds share in said property, which will more fully and at large appear, reference being had to a copy of said letters hereto appended, marked 'Exhibit 'A'"'" (Rec. p. 30).

In his answer he further explains the transaction in regard to the $750 note, and avers, upon information and belief, that the note had really been paid to George W. Utermehle during the life of his father, and that George W. Utermehle well knew the note had been satisfied, and therefore that the legacy mentioned was nothing more than an effort to make proper restitution to respondent in this regard; further, that the note was not in the possession or under the control of George W. Utermehle at the time of his death, and it is charged the pretended legacy was merely an artifice intended to deceive appellant, immediately upon the discovery of which and of the real condition of affairs by an examination of the testimony in certain equity suits and otherwise, he offered and tendered in and by said letters to make proper settlement regarding said pretended lagacy. Respondent further says that just after the funeral of George W. Utermehle, he, with said daughter and Sarah Utermehle, returned to the house where the alleged will was read, and at a meeting of the same parties held at the same place the following day, the petitioner, Rose M. Taylor, in the presence of said parties, announced to respondent that they realized that he had been cut off with almost nothing, but that there would be no difficulty in adjusting this, as

they had arranged with the widow, Sarah Utermehle (who, she declared, had received about one-half of the estate under the will) that she, Sarah Utermehle, by her will, would arrange matters justly so that respondent would receive ultimately as much of the estate of George W. Utermehle as each of petitioners, to which statement and agreement both Sarah Utermehle and Mamie E. Norment assented. That respondent, being ignorant and under a misapprehension concerning his rights as aforesaid, relied upon these assurances and promises of fair treatment, but, not regarding same in the slightest and without the knowledge of respondent, Sarah Utermehle did, three or four months after the death of her husband, make a will which is now on file in this District, by which her property is merely devised in three equal parts between petitioners and respondent, share and share alike, such disposition being the same disposition the law would have made had she died intestate; and it is further shown that at the time of her death Sarah Utermehle had less than two hundred thousand dollars, exclusive of certain promisory notes made by the several heirs at law, remaining of the large amount which she received from George W. Utermehle, it being charged that petitioners had systematically secured large sums of money from her, thereby rendering it impossible for her to keep faith with respondent, of which fact he was unaware until shortly after the death of Sarah Utermehle, when he was informed by petitioner, Rose M. Taylor, greatly to his surprise, that his grandmother had died comparatively a poor woman, and when he discovered the disposition that had been made of her property he was both surprised and pained to find that no regard had been paid by either the deceased or petitioners to their agreement to equalize respondent's share as one of the three heirs at law of George W. Utermehle, whereupon he at once censured and upbraided petitioners, especially the said Rose M. Taylor, for their want of faith. That at this time he was ignorant

of his rights, as well as of the facts that surrounded the original making of the will rendering same invalid. No opportunity had been afforded him to consult counsel, and shortly thereafter he was taken dangerously ill while in Frederick, Md., and was compelled to remain away from the District of Columbia until November, 1899, when, after having resided many years away, he returned to the District and for the first time received information which put him upon inquiry; he then, for the first time, about May, 1900, became apprised of his legal rights.

Further answering the allegations of estoppel, respondent declared that petitioners had no right to contend that he is estopped from asserting his rights when, as a matter of fact, he relied upon their false and fraudulent representations, believing the same to be true, while they well knew all the conditions surrounding the case, and not only were cognizant that the alleged will of George W. Utermehle, and the entire proceedings thereunder, were tainted with gross fraud, but must have known that once advised of the true state of facts, respondent would have promptly contested the validity of said paper-writing.

On November 17, respondent also filed a replication to the answer filed to his first caveat, which replication, it is agreed (Rec. p. 117), contains in substance the same matters set up in the answer. Respondent filed (Rec. p. 32) certain exceptions to the petition filed by Rose M. Taylor and Mamie E. Norment. These exceptions question the validity of section 10 of the act of Congress of June 16, 1898, as applying to vested rights, and also question the right to set up the act of Congress where a petition has been filed for the probate of a will under said act as a will of real property (section 10 of this act has since been repealed). Issue was joined on the several answers and replications filed (Rec. p. 33), and before the trial the death of Rose M. Taylor was suggested in a petition filed (Rec. p. 33), by Leroy M. Taylor, her husband, with a copy of her will attached, the same

bearing date the 3d day of December, A. D. 1889. This will devised all her property to her husband, Leroy M. Taylor, Sr.; attached thereto was an agreement by said Leroy M. Taylor, Sr., dated February 15, 1901, whereby he covenants to hold said property for certain purposes under an alleged verbal trust (Rec. p. 35). Under an order of court, Leroy M. Taylor, Sr., and Leroy M. Taylor, Jr., and his children, Mildred Taylor and Dorothy Taylor, were made parties in the place of Rose M. Taylor, deceased. On March 27, 1901, issues were duly signed by the court, which said issues are as follows:

> "1. Was the said Charles H. Utermehle, on the 9th day of June, 1900, estopped against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing dated the 7th day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of personal property?
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> "2. Was the said Charles H. Utermehle, on the 27th day of September, 1900, estopped as against said Rose M. Taylor and Mamie E. Norment from disputing the validity of said paper-writing, dated the seventh day of December, 1887, as the last will and testament of said George W. Utermehle, as a will of real estate?
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> "3. At the time of the execution by said George W. Utermehle of said paper-writing dated December 7, 1887, as his last will and testament, was the said George W. Utermehle of sound and disposing mind and capable of executing a valid deed or contract?
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> "4. Was the execution of said paper-writing, dated December 7th, 1887, by said George W. Utermehle, as his last will and testament, procured by the undue influence of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or any other person or persons?
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> "5. Was the execution of said paper-writing, dated the 7th day of December, 1887, by George W. Utermehle, as his last will and testament, procured by the fraud of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

"6. Was the execution of said paper-writing, dated December 7, 1887, by said George W. Utermehle, as his last will and testament, procured by the duress or coercion of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

"It is further ordered that the questions of the application of the statute of limitations and all other questions of law which could have been raised prior to the framing of these issues and not passed upon by the court during the course of the trial on said issues *shall be reserved for future determination by the court upon motion of counsel for any of the parties thereto.*"

A day having been set for trial, the court made an order making the plaintiff in error, caveator, Charles H. Utermehle, plaintiff, and the caveatees, Mamie E. Norment and the representatives of Rose M. Taylor, defendants. *After hearing the testimony on the question of estoppel, and that alone, the court instructed the jury to return a verdict in favor of the caveatees on all of the issues;* and on the 7th day of June, A. D. 1902, the court signed a decree admitting the will to probate and record. The record, from page 43 to page 174, contains the testimony that was offered in evidence at the trial. All of the testimony and the proceedings had in the case are set out in the bill of exceptions. On account of the fact that the case was decided on the issues of estoppel, in considering the testimony in this statement we will set out merely that which refers to these issues.

The caveator was sworn as witness and testified, among other things (Rec. p. 51), that his name is Charles H. Utermehle, and that he at present resides at 1132 Twelfth street, in the city of Washington. He used sometimes to ride around the city with his grandfather and go with him to the oyster wharf. That his grandfather was extremely pleasant to him, but had his own peculiar ways, of course.

That when he went to the house he saw grandfather, grandmother, and Mrs. Norment until she was married; does not think that he stayed all night at the house until after Mrs. Norment's marriage; was then a little over eight years of age; the marriage occurred in September, 1873. That on these evenings when he was at his grandfather's house after supper they often played dominoes, and his grandfather would retire at 8 or 9 o'clock and get up some time about 6. That on several occasions he went to market with him, and often went to the Eleventh street oyster wharf; that on Sunday, as a rule, Dr. and Mrs. Taylor came over to dinner or to tea; that witness left Sunday evenings about 4 or 5 o'clock; that sometimes he would stay all night. That on one occasion, before witness was 18, his grandfather took him in his buggy, this being about 1887, in the fall. Thereupon witness was asked the following questions:

Q. Now, Mr. Utermehle, just tell us in your own way and as fully as you can what your grandfather said to you on that occasion. In the first place, how did you happen to go in his buggy? You say this was on the occasion when he took you home in the buggy? How did he happen to do it on this occasion?

Mr. Worthington: Mr. Utermuehle, please do not state any conversation; you can state the preliminaries and so on, but when we come to conversation I want to object.

A. I did not know that there were any preliminaries to the matter; it was a simply a conversation.

Mr. Perry: Well, how did you happen to go in the buggy?

A. He said: "I am going up town this afternoon and I will take you in when you go."

Thereupon, upon request, Mr. Perry reduced to writing what he expected to prove in the answer to the last question as well as other questions to be put to the witness. The following offer was made:

"We expect to prove the testamentary declarations of George W. Utermehle in 1877. We expect

to follow that up by proof as to another declaration about the same intentions in 1882. Then we propose to offer the testimony of another witness as to a time somewhere between 1882 and the time of the testator's death, so it is not simply the declarations in 1887 that we expect to prove in answer to this question; but we expect to show a purpose formed at that time and adhered to up to near the time of the death of the said George W. Utermehle."

To which question and offer of proof counsel for the caveatees objected; the court sustained the objection and counsel for caveator excepted.

And thereupon he was asked the following questions:

Q. I will ask you to state whether or not on that occasion (referring to the conversation in 1877), your grandfather said anything to you with reference to a suit that was then pending in this court, brought by his sisters and others against himself, to which you were defendant?

A. He did.

Q. I will ask you what he said with reference to this suit?

Objection; objection sustained. Exception noted on the ground that the answer would be merely introductory to the main conversation about which it was proposed to interrogate the witness; and, in order to show the object of the conversation, Mr. Perry thereupon made the following offer:

"I offer to prove by this witness here upon the stand, duly sworn, the following facts: On that occasion a suit had been brought in the Supreme Court of the District of Columbia by the sisters of George W. Utermehle against himself and others, as defendants, claiming that he had fraudulently disposed of certain property for which he was trustee under his father's will and in which his sisters had an interest; that the witness, Charles H. Utermehle, Jr., was a party defendant to the said suit; that on the said occasion and during the said ride in the said buggy George W. Utermehle expressed to the witness, his grandson, great anxiety about the suit and requested him, the witness, not to have anything to do with

the suit, and then and there told him that if he would refuse to have anything to do with the suit, he, the grandfather, George W. Utermehle, when he came to make his will would leave him an equal share with his daughters of his estate."

This testimony was offered, first, as showing the disposition and feeling at the time of the testator towards his grandson; secondly, as in the nature of a contract on the part of the grandfather and grandson, that if he would take a certain line of action at one time the grandfather would do a certain thing in consideration of it; and thirdly, as showing what the testamentary intentions of the testator were at that time in connection with his sanity. It is offered under the issue of testamentary capacity as showing what his testamentary intentions were at a time when there was no intimation in this case that he was of unsound mind. A further offer was made to prove by this witness that he accepted the promise made by his grandfather to him in that connection, and, in point of fact, did not have anything to do with the suit otherwise than as a nominal party defendant thereunder. The court sustained the objection to the question and offer of proof, and counsel for the caveator excepted. Witness further testified that he had another conversation, in the '80's, '81, or '82, and had two or three conversations on the same subject. And then Mr. Perry dictated to the stenographer the following offer of proof:

"It is offered to prove by the witness that in 1881, the latter part of the year, the testator, George W. Utermehle, said to his grandson, when the grandson, Charles H. Utermehle, Jr., the witness, had spoken to him with reference to his mother's intention to make some improvements upon a certain lot of ground that she owned in this city, that he, George W. Utermehle, had a deed of trust upon this said lot and that the witness had better advise his mother not to make any improvements upon it; and then went on to say that the witness, Charles H. Utermehle, Jr., need take no care about his future

> as he, the testator, intended to provide for him equally with his other children."

To which offer objection was made by counsel for caveatees and objection sustained, and caveator noted an exception.

Witness further testified that he had another conversation in 1883, and then Mr. Perry dictated the following offer of proof:

> "It is offered to be proved by the witness upon the stand that, in the early part of 1883, the testator, George W. Utermehle, at his house in this city, referring to the general subject of the two preceding conversations, again stated to the witness that he intended, when he made his will, to give the witness his, the witness, father's share of his estate—"

to which offer counsel for the caveatees objected; the court sustained the objection and counsel for the caveator excepted.

Whereupon said witness further testified that when Dr. and Mrs. Taylor were at the house of his grandfather, their talk was almost always about his rents, repairs, etc., and suggestions were made to Mr. Utermehle to do this or that in the way of repairs or in reference to loans; that in 1883 witness saw very little of his grandfather, and that he was really not regularly in Washington from June or July of 1882; that he did not notice anything particular about the progress of the drinking habit of his grandfather up to 1882, and he could not testify as to what his condition was then as to drinking. From May, 1883, to December, 1887, he was in Frederick most all the time, with the exception of about four or five months in the early part of 1887; that he might have been in the city often for a couple or weeks, in 1885, and he saw his grandfather about the 8th of February, 1884; he was then 19 years old; came to Washington on his wedding trip; made a visit of possibly an hour at his grandfather's house; has no recol-

lection of how long he was in Washington in 1885, but may possibly have been in Washington during the winter of 1885 or 1886, but has no recollection of seeing his grandfather in 1885; he might have seen him once or twice in 1886; he was home at Christmas, 1886; he never stayed all night at the house after he left for Frederick, and has no recollection as to the condition of his grandfather in respect to drunkenness from the year 1886; that he saw his grandfather possibly a dozen times at his house in 1887; did not meet him anywhere else. Witness was in Washington from February until June or July, 1887; that he took dinner, Christmas, 1887, at his grandfather's house, accompanied by his wife. That his grandfather on that day appeared to be under the influence of liquor; that at this time his grandfather was not as active as he generally was, and that he came downstairs in the evening in his night clothes and the girl or woman went out in the hall and got him and took him back upstairs; that on this occasion he had the appearance of drinking more than at any other time during the whole year; that in 1888 witness lived in Frederick and was in Washington very little, possibly two or three times a year, until the winter time, 1889. Possibly he saw his grandfather four or five times in November or December, 1888; he came to Washington and was back and forth between Washington and Frederick several times each month from then until his grandfather's death. That his grandfather died April 16, 1889, and that during the months of January, February, and March, 1889, he went to see him possibly once a month. Found him generally lying on the sofa; he was rather feeble, stooped in his walk and seemed to have lost all interest in busines. Was present when he died; was there several times a day then two or three days before he died. That from December, 1887, until the time he died, witness never saw him down in the city at all; that witness did not see his grandfather sufficiently often from 1883 until his death to be able to give his opinion about his

mental capacity, and he does not express any opinion. Witness was in the real estate business in Washington awhile in 1887, but in June or July of that year returned to the farm near Frederick and remained there until 1893 or 1894 and continued to run it until 1899; that from 1895 to 1898 he ran the City Hotel in Frederick, and that he left Frederick in November, 1899, and came to Washington, and since that time has lived in Washington, except two or three days and possibly not over a week, when he was in Frederick. That during the last eighteen months of his grandfather's life from what witness saw of him witness thought he was getting feeble; he was weak and decrepit; that at one time witness went to see him in regard to getting some insurance on some plate glass, and then he offered him the piece of property of 27 acres on Queen's Chapel road, for sale, and said he would take $5,000 for it. That witness did not know of his grandfather attending to any business from December, 1887, until his death; that his grandfather always gave him a Christmas present anywhere from $50 to $100; that immediately after his funeral the will was read by Mr. Woodward at the house; that witness got up, when it was read, and never said a word, and Mrs. Taylor said, "You come over tomorrow;" the next day witness went over and went into the dining room and there were Mrs. Taylor and Mrs. Norment and the grandmother. They were all sitting around the dining-room table. Witness was not sure who began the conversation, but possibly Mrs. Taylor. Mrs. Taylor started the conversation by saying that the will had virtually cut witness off; that it was through the persuasion of the doctor and herself that he had been left the property at Sixth and Louisiana avenue; that his grandmother was left all the personal property, which almost, if not quite, equaled what they had received; *and that when she died she proposed to make him right, to make him equal with them by equalizing his share;* and, further, that she wanted to know what the

mortgage on his farm was; that she understood there was a mortgage on his farm, and that she wanted to pay it off. She wanted to start him out without any debt on it. His grandmother was sitting there at the time; they were all sitting together. When Mrs. Taylor made these remarks his grandmother did not say a word. He was asked what the mortgage was on his farm and told them $11,500. Mrs. Taylor asked it, and she said: "Ma wants to pay that mortgage off," and so forth. Mrs. Utermehle, the grandmother, simply smiled and acquiesced. She did not say a word. There was not a word said by anybody at all except Mrs. Taylor and himself. The only remark he made was what the mortgage on the farm was. They were all sitting at the table; they were very close together. This was in the dining room of the house, which was really the living room. Mrs. Taylor spoke in her usual tones, and Mrs. Utermehle smiled and nodded, and she made one remark; she said: "Yes, I want to pay your mortage; I want to know what it is." That was the time the question was asked about the mortgage. This was after Mrs. Taylor said her mother was going to equalize witness with the others. Witness' grandmother said, speaking of the mortgage, "I will fix that up for you right away."

Witness was then asked this question:

Q. I will ask you whether or not you believed what was then said to you as to what your grandmother would do when she made her will?

A. I did.

Q. Did you not have any doubt about it at that time?

A. None whatever.

Witness further testified that the interview was not very long, possibly three quarters of an hour or an hour. Witness was at that time twenty-three years old. That no money was given him then nor on that day. Witness recollects that his grandmother said she would give him a check for the mortgage in a few days, and witness then went home.

Witness further testified that a few days after he called at the house he was at H. J. Fagan's liquor store on Eighth street, and a cab drove up and a party brought him a note which said he was needed at once at the city hall. The note was signed by William R. Woodward. That he went up to the city hall and Mr. Woodward, Dr. Taylor, and Mr. Norment were standing in the office, and his grandmother, Mrs. Norment, and Mrs. Taylor were sitting there in front of the place. He was handed a paper, and they said that grandmother wished to administer on the estate and take out letters that day, and he was asked to sign it. He signed his name to it; did not read it at all; simply signed his name; it had already been signed by the other parties; said nothing at all. At the time he signed it, Dr. Taylor or Mr. Norment touched him on the back and said: "That is worth one hundred thousand dollars to you." Witness answered: "I am much obliged," and further: "Is that all you wish of me?" and they said: "That is all," and he walked out. That Woodward explained to him, when he went in, saying: "Your grandmother is anxious to take out letters today; just sign this paper, will you," and it was then handed to him and he signed it, and then the remark was made: "This is worth one hundred thousand dollars to you." Witness was not positive whether Mr. Norment or Dr. Taylor made the remark, but knows that it was loud enough for his grandmother and Mrs. Norment and Mrs. Taylor to hear. Then witness said: "Is there anything else you wish me to to do?" and they answered "No," and he walked out. Witness was given a check for five thousand and some hundred dollars and one for $5,000, for which he gave his note, and then was paid two thousand and some dollars in payment of a $750 note and interest, and that was the way the $11,000 was made up. That the $750 note was on file in Equity 8141; that witness had not much money at the time his grandfather died, and that his income was about $600 a year, and that he had the farm, for which he paid $16,500; that his grandfather

knew his financial condition; that witness lived continually at Frederick after the death of his grandfather, and that his grandmother died in 1893, and that during her life she lent him $20,000. That witness has no personal knowledge of the advancements made to his grandmother's daughters except what he has seen; that he received the property at Louisiana avenue and Sixth street under his grandfather's will and sold it for $20,000; that between the death of his grandfather and the death of his grandmother he did not do any act to attack his grandfather's will, and when asked why he did not, replied: "I relied on the promise made me the day after the funeral."

Q. By whom?

A. By Mrs. Taylor, in the presence of Mrs. Norment and my grandmother.

Q. You mean the promise you have testified to here?

A. Yes, sir.

Q. When he died, in 1899 or about that time, what knowledge, if any, did you have with respect to the law of estoppel?

This question and also the other questions below, as to the witness' ignorance of law, were objected to by counsel for the caveatees, but after argument on the objection had been partly heard the court decided to admit the evidence for the time being, reserving the question of its competency till a later stage of the case.

A. None whatever.

Q. What knowledge did you have, if any, with respect to your rights in the matter then and there?

A. None whatever.

Q. Did you have any knowledge with respect to what we lawyers call the doctrine of election, that is, a rule of law or equity that would prevent you, if you take any benefit under the will, from disputing it in any way?

A. I did not.

That at this time the witness was 23 years of age; that

he never studied law nor read any law books until very lately, and that he relied absolutely on the promise that was then made to him by Mrs. Taylor in the name of his grandmother, in her presence and in the presence of Mrs. Norment, and that at this time, i. e., the day after his grandfather's will was read, he had no knowledge whatever with respect to the facts that he has set out in his caveat.

Q. What *knowledge*, if any, did you have with respect to the testamentary capacity of your grandfather at the time he made the will?

A. *None whatever.*

Q. What *knowledge*, if any, did you have with respect to *undue influence* practiced upon your grandfather by Mrs. Taylor or any other person?

A. *None whatever.*

Q. What *knowledge* did you then and there have as to whether or not George W. Utermehle, at the time he made the alleged will, was of sound and disposing mind and capable of executing a valid deed or contract?

A. *None.*

Q. What *knowledge* did you then and there have as to whether or not this alleged will of George W. Utermehle was procured by the undue influence of Rosa M. Taylor or Leroy M. Taylor, Sr., or either of them, or of any other person or persons?

A. *I had no knowledge.*

Q. What *knowledge* did you then and there have of any fraud on the part of Rosa M. Taylor and Leroy M. Taylor, Sr., or either of them, or of any other person or persons, towards George W. Utermehle, in the procuring of this will?

A. *None whatever.*

Q. What *knowledge* did you have, then and there, of any duress or coercion on the part of Rosa M. Taylor or Leroy M. Taylor, Sr., or either of them, or of any other person or

persons, towards George W. Utermehle, in the procuring of this alleged will?

A. *I had none at all.*

Q. State what knowledge you had at that time of the habits of intoxication of your grandfather, and of the extent to which they had progressed.

A. I had no knowledge other than that to which I have already testified.

Q. To what extent did your knowledge then go of the association of George W. Utermehle with Mrs. Taylor and her husband in a business way?

A. I had no knowledge other than that Mrs. Taylor acted as a clerk for him and looked after his writing.

Q. And so far as her husband was concerned, how far did your knowledge then extend?

A. I had none whatever, except as to the conversation that I had overheard between them as to loans. That was all.

Q. To how late a period did the ignorance and want of knowledge referred to in the preceding questions relating to this particular time extend?

A. Until some months after I returned to Washington to live.

Q. In what year?

A. 1900. I came back here in 1899 and it was in 1900 that I first learned of anything of the kind.

Witness further testified that from the time of his grandfather's death down to the time of his grandmother's death nothing was said to him of any change of intention on her part, and that after her death, the next morning in the dining room, Mrs. Taylor spoke to him; could not say whether Mrs. Norment was present or not. Mrs. Taylor said: "Well, ma is dead; she was very liberal during her life; had she lived a few years longer she would have died a poor woman;" that she had very little left of what she got from

his grandfather; and witness did not say anything more than that he was surprised to hear it. After the funeral they all returned and the will was read and witness could not understand much about it; had a conversation with Mrs. Norment and Mrs. Taylor a day or two afterwards, and they said the grandmother was worth about $200,000, and then he remarked that it was a surprise to him; that he understood the personalty was worth almost, if not quite, equal to the real estate, and that he always understood the real estate would run up a million and two hundred thousand dollars; that he could not see how the personal property should have depreciated so much in two years, and Mrs. Taylor said there was no use in discussing it, and that "Ma had given to charity," and had given to this and that, and witness remarked: "Well, I guess I will have to stand it, then." A few days after that witness went to Frederick. The remark that witness made was: "This will is a great surprise to me and I presume it knocks me out entirely, something I did not anticipate." That witness anticipated an entirely different will; did not know what to do; that he went back to Frederick a few days after that and was taken sick with rheumatism and never came back to Washington to attend to any business in regard to his grandmother's estate or anything of the kind. Witness executed a power of attorney to Charles W. Handy, who attended to all these matters and gave receipts for him. Thereupon he was asked the following question:

Q. Now, why did you not then put the matter in a lawyer's hands?

A. Well, I kind of thought I could not get much out of that will of my grandmother's and I thought my grandfather's will was so far back that I had nothing to do; at least, I was entirely indifferent; I lost heart; my health was bad at the time, and I had other troubles and things; my health was in pretty bad shape; I was sick in bed with rheumatism possibly five or six weeks, and I was really, for eighteen months

after that, more or less subject to limping and walking around and having pain.

And he further testified that he did not entirely recover until 1895; was suffering from a combination of inflammatory and sciatic rheumatism. That in 1893 witness was drinking to some extent; that he had financial troubles as well as troubles in private affairs; that he was never able to actively attend to business after his grandmother's death until he took the City Hotel in 1895; that witness got about sixty thousand dollars and a third interest in the square on Capitol Hill from his grandmother's estate, and his interest in that square was sold under a deed of trust for $13,500.

Thereupon the following question was put to him:

Q. Now, Mr. Utermehle, when was it that you first learned any facts with respect to your grandfather and his will that you did not know before, and what was the occasion of it?

A. The occasion started with my mother telling me, one evening, that she had been down to talk with Mr. Terry.

Witness further testified that he went to see Mr. Terry, and that his mother went to see Mr. Lambert, and Mr. Lambert came up to the house about four or five o'clock one evening, by appointment. Witness and Mr. Lambert then went to look over the papers in the grandmother's estate in the Orphan's Court, and then they looked at the papers in Norment *vs.* Norment, which witness had never read before, and also the case which involved the $750 note, and that he had further conversation with Mr. Lambert, and after looking at the facts testified to in the several cases, took Mr. Lambert's advice and mailed the letter, heretofore referred to, tendering back his property; that two letters were mailed, one to Mrs. Taylor and one to Mrs. Norment, and that he did not receive any answer to either letter, and that no answer had been received to either of them up to this day, and that he had received no communication from

Mrs. Taylor or Mrs. Norment; that he continued his search for information and facts, interviewed a large number of persons from whom he learned quite a few things in regard to his grandfather's capacity and in regard to his actions; a good deal about his drinking habits, and also learned a great deal about his business relations with Dr. Taylor and his wife; that every bit of information received was laid before Mr. Lambert and he was instructed to file the caveat that was filed in the case. That there was no executor of his grandfather's estate when he made the tender in the letter set out in the record, there being none appointed after the death of witness' grandmother, who was executrix under the will; that he was in a position to carry out his promise at the time that he wrote the letter making the offer of tender. That he knew quite a good deal of his grandfather's property at the time of his death, and that he never heard of any other will made by his grandfather, except the one mentioned by Mr. Perry in his opening statement as having been made in 1859; that his grandfather, up to three or four years preceding his death, or possibly a little longer than that, in conversation with witness, talked very little, and would not hold any protracted conversations with witness; his grandfather was not, in December, 1887, transacting any business at all; that the last business he knew him transact was early in the summer of 1887, and that from the time in December that he signed the will to the time of his death he did not transact any business; *that when the will was read after the funeral, witness did not notice the date, and that his attention was not called to the date of the will until Mr. Lambert called his attention to it in 1900. That from the reading of the will he was led to believe that the will had been made quite a few years before his death because it referred to the $750 note, which to witness' own personal knowledge, had been paid in 1884.*

Thereupon was offered in evidence a citation issued to witness to appear in court on Tuesday, the 31st day of July,

A. D. 1900, and show cause why a paper-writing, dated the 7th day of December, 1887, purporting to be the last will and testament of George W. Utermehle, deceased, should not be admitted to probate and record as a will of real property.

On cross-examination, witness testified that in the spring of 1882 he was about seventeen years old, and that he generally spent the summers away from the city, and that he went to Frederick in 1882, and that he visited his grandfather when he was from ten to eleven years old, from Fridays to Sundays, possibly fifteen times a year. That he used to go there every Christmas until he went to Frederick; that he did not notice any indications of unsound mind up to 1882; that he lived in Frederick from 1882 until February, 1887, when he went into the real estate business with S. D. Newcomb in the city of Washington, and remained there until the middle part of June; that during this period he went back and forth to Frederick, and that during this period he went to see his grandfather about a half a dozen times; he could not say whether he was drunk or sober, and did not notice that he was drunk; that at Christmas, 1887, he seemed to be drinking, and witness testified exactly to his actions during his visit on that occasion; that on this occasion he was given a Christmas gift of either $50 or $100; thinks the money was handed him by Mrs. Taylor; that he was giving it to all of them; that he was back and forth between Frederick and Washington between Christmas of 1888 and the day he died; that he saw him on two or three occasions between that time. Witness here identified certain checks which were endorsed by him, and also a power of attorney given to Charles W. Handy, which power was signed at Frederick, was witnessed by C. H. Doll, a resident of Frederick City; that Mr. Handy came there when witness was sick in bed and got the power of attorney; power of attorney was dated the 5th day of May, 1893; that witness did demand that the executrixes under

the will should act without commission, and that they agreed to do so; this agreement was arranged before he was taken sick; that they agreed with Mr. Carusi and Mr. Handy; that he discussed the division of the estate with Mr. Handy and also with Mr. Carusi, who was a friend of witness; that he did not authorize Mr. Carusi to see them about the matter, but thinks that Mr. Handy and Mr. Woodward had a great many conversations about it; that, however, he did not know of his own personal knowledge that they had agreed to act without commissions; that he thinks he was informed by Mr. Handy or Mr. Carusi, but he was not certain of that. Then was offered in evidence a letter of Mr. Carusi directed to Mr. Woodward in regard to the realizing on some deed of trust notes, the date of the letter being June 6, 1893; that witness also agreed to certain payments of money as gifts prior to his being attacked with rheumatism; and then were offered in evidence certain checks and receipts, which appear on pages 86, 87, and 88 of the record. And then was offered in evidence a paper showing the distribution of the notes of the estate of Sarah Utermehle, July 1, 1893, which distribution showed that Mrs. Taylor, Mrs. Norment, and witness received one-third each. Witness further testified that certain misrepresentations were made to him by Mrs. Taylor, among others that she did not carry out the promise that was made to him by his grandmother on the day immediately after the reading of the will so as to leave witness a sum to equalize his share with the others; that Mrs. Taylor told him that the personal estate left by his grandfather to his grandmother was almost, if not quite, equal to the estate that was left them, and that when she died she would leave him so that he would be equalized with them all, and that his grandfather had left his money in that way, intending that his grandmother should take care of him. That from these remarks witness inferred that the personalty was equal or almost equal to the realty. In other words, his estate was in two equal parts, half being

in realty and half being in personal property, and that it was understood that when his grandmother died she would leave him in such a way that he would be equalized with the others; that Mrs. Taylor never said that in exact words, but that was the natural inference to draw from what she said. Witness further testified that until May, 1900, he thought the statement made him at the time of his grandfather's death was true, and that if the statement that she only had $400,000 worth of personalty was true, the other must have been false, and therefore it had been misrepresented to him; and he further found out that her will was made almost immediately after his grandfather's death; that witness did not discover these circumstances until 1900, and that in that year he discovered that his grandfather had been controlled in all his business relations, as set out in the replication; that witness considered the promise made after his grandfather's death in the nature of an agreement, on account of his action at the time; however, there was nothing said about his attacking the will, but it was simply said that witness had been left out of the will; and it was through the persuasion or instrumentality of Mrs. Taylor that he was left anything at all; and that when he was told of this and it was understood that when his grandmother died she would leave things to equalize him, he said: "Well, that is all right; I will do that." That witness, at the time of his grandfather's death, believes his grandmother was left a good deal more than six hundred thousand or seven hundred thousand dollars worth of personalty in addition to the realty; that witness was completely prostrated when the will of his grandmother was read, and, as he puts it, he said to Mrs. Taylor, the day after the conversation took place in regard to the little furniture and things to be given away:

> "So far as I am concerned I have got the worst of it and I have got to stand it. I never made but one mistake in my life, and that was when I held still once before, and now I have to stand still."

That his best recollection is that Mrs. Norment was there; also he is positive she was there when the conversations took place; that witness was here about ten days after his grandmother's death, but during this period he thinks he went to Frederick; that when he went to Frederick he had no intention of remaining there; that during the ten days he was completely knocked out, but that there was not anything to prevent him from employing counsel, if he had known what he knows now; witness further testified as to his habits in 1893, as to his being at certain places, certain affairs, and further, that, when he signed the waiver of citation, Mr. Woodward said to him: "Your grandmother is here and would like to take out letters on your grandfather's estate today and we would like for you to sign this paper." That his two aunts were there and but six people present; that witness was ready to procure the property mentioned in the letter and prepared at any time to carry out the letter; that he supposed he had received about eighteen hundred dollars rent before he sold the Young Law Building, but that the rents down to date would be in the neighborhood of $10,000; that he had made all arrangements with his attorney, Mr. Lambert, to get whatever money was necessary to carry out the letter, and that he was willing to have charged against him that portion of the estate of Sarah Utermehle which he took as his distributive share, and that he was willing to deliver back the property and the supposed legacy of the $750 note; that all arrangements in regard to the money were made with Mr. Lambert and Mr. Handy. Then was offered in evidence the deed of trust of witness' interest in square No. 765. Then was offered in evidence another deed of trust bearing date September 3, 1896.

And further to maintain the issues on his part joined, the caveator produced Wilton J. Lambert, who testified (Rec. p. 114), in substance that he was a lawyer; has been a member of the bar since 1894, and knows Charles H. Utermehle

very well, and that he is the Wilton J. Lambert spoken of in the testimony as the person with whom Mr. Utermehle consulted, and that a request was made on the part of the caveator to obtain sufficient money to tender to other parties what he had received under the will of his grandfather, and that witness made these arrangements and had under his control upwards of $30,000 in cash, about $25,000 of which was money that he could use as he pleased, and that he assured Mr. Utermehle that the tender could be made good, and that he had sufficient money to substantiate the tender and make it good; that witness had the money from the time the letter was written until several months thereafter. That no response was received from Mrs. Taylor or Mrs. Norment directly, but that he received a response from their attorneys. Mr. Woodward was always their attorney, but the first response that witness had to the letter was from Mr. Worthington. About two or three days after the letter had been sent witness was called into Mr. Worthington's office and Mr. Worthington informed him that there was going to be a contest; that Mr. Woodward was to see him, representing the Taylors, and that the matter was going into litigation; that witness remarked that as it was then the approach of summer, they would do their best to keep them busy all summer; that the word "contest" or "fight" was used in connection with the conversation, probably both; and witness was informed that the letter had been received. He had no further reply to the letter, but met Mr. Worthington once or twice after that in the corridor in the court house, and the conversation was confirmatory of the first conversation. He also met Mr. Woodward, and he talked on the same lines. Having received these declarations, and having received no further response to the letters of tender, witness told Mr. Utermehle there was going to be a fight, and as they announced that fact there was no necessity for a further tender. Witness informed Mr. Utermehle of the first conversation

within a few minutes after it occurred. Mr. Utermehle was in witness' office when he went back from Mr. Worthington's office. On cross-examination witness testified that he had arrangements so fixed that he was able to obtain the cash the moment he saw fit to obtain it. That he could have obtained $45,000 or more; that the figure, however, given to Mr. Utermehle, was $30,000. Mr. Perry here stated that no tender had been made under the grandmother's will, but there was an offer in the pleadings to account for that part.

Thereupon Charles W. Handy was produced as a witness and he testified that he was a real estate broker in the city of Washington; he stated that in May, 1900, Mr. Utermehle requested him to procure an option on the Young Law Building; that he telephoned Mr. George A. Easterday in the Ames Building, who, witness understood, had the property for sale. He, however, found out that Early and Lampton had it up; he was telephoned that he was given an option, and the option was for $25,000, and whether it was for three or four weeks witness was not sure; it was certainly for three or four weeks; that it was all verbal.

Thereupon it was agreed (Rec. p. 118) that evidence had been offered tending to prove that George W. Utermehle, at the time he made his will, and at the time of his death in April, 1889, had real estate of the value of $1,000,000, and that the rental thereof was $55,000; that no inventory was filed of the personal property and special bond was given, and that the said George W. Utermehle died possessed of a large personal estate which, by the terms of his will, was all bequeathed to his widow, excepting certain legacies; and then was offered in evidence (Rec. p. 119) the will of Sarah Utermehle, which will was witnessed by three witnesses and dated the 5th day of July, 1889, and which divided her property equally between Rosa M. Taylor, Mamie E. Norment, and Charles H. Utermehle, share and share alike, and appointed Mrs. Norment and Mrs. Taylor

executrixes, which will was duly admitted to probate on the 17th of March, 1893, Charles H. Utermehle waiving citation thereof (Rec. p. 120). And then was offered in evidence the agreement disposing of certain personal property (Rec. pp. 121, 122) of Mrs. Utermehle, said agreement being signed by Charles H. Utermehle through Charles W. Handy, his attorney; then was offered in evidence (Rec. p. 122) several papers showing the amounts received by the next of kin of Sarah Utermehle, each one receiving $84,257.87, either in money, securities, or property. Then was offered in evidence (Rec. p. 123) a deed made by Rosa M. Taylor et vir to Mamie E. Norment, being a deed conveying to Mrs. Norment her share of the estate devised under the alleged will. And then was offered in evidence (Rec. p. 127) a deed of Mamie E. Norment and Samuel Norment to Job Barnard, conveying the same property, the deeds bearing date the 18th day of July, 1899, the property being conveyed to Job Barnard as trustee; and then a deed of Job Barnard, trustee, on the same day, conveying the property to Samuel Norment. And then was offered in evidence (Rec. p. 128) the original bill in the case of Mamie E. Norment *vs.* Clarence F. Norment et al., wherein Mamie E. Norment alleges that the several deeds were obtained from her by fraud and duress and threats of Samuel Norment. Whereof she prayed that she be decreed to be full owner in her own right in fee simple of all of said real estate conveyed by her to her husband through the said Job Barnard, trustee, and then an accounting. To this bill answers were filed, and then a compromise was entered into whereby a part whereof was reconveyed to Mrs. Norment, and the balance, as near as practicable, was conveyed to Ellie Norment and Harry Norment, children of Mamie Norment.

Thereupon it was further stipulated and agreed (Rec. p. 157) that Mrs. Rose M. Taylor, in the month of May, was seized of all the real estate which she derived under her father's will, except certain parcels which had been sold for

the purposes of partition, which were of the value of about $40,000; and that Mamie E. Norment was seized, in the year 1900, of real estate derived by her under the will of her father, of the value of not less than $100,000, and that no other will of George W. Utermehle than that offered in evidence with this case has ever been filed in the office of the register of wills in the District of Columbia.

And thereupon Thomas F. Woodward was duly sworn as a witness on behalf of the caveator, and he testified (Rec. p. 157) that he was a member of the bar and one of the attorneys in the case, and that he has not in his possession any will of George W. Utermehle, and that he has no knowledge of any other will of George W. Utermehle than that which was offered for probate here, and that he has acted as attorney for the caveatees in this case since May, 1900, and acted as their attorney in the case of Norment *vs.* Norment, and also in the estate of Sarah Utermehle; that he became attorney in Norment *vs.* Norment in 1892, and that he was a witness to the will of Sarah Utermehle.

And thereupon Harry Norment, being duly sworn, testifies (Rec. p. 158) that he is one of the grandsons of George W. Utermehle, and that he has no knowledge of any other will of George W. Utermehle than the one which has been read in evidence in this case.

And thereupon Ellie Norment Booz was duly sworn and testified (Rec. p. 158) that she was a daughter of Mrs. Norment and the granddaughter of George W. Utermehle, and that she had no knowledge of any other will of the late George W. Utermehle than the will here in question; that she had a faint recollection of when George W. Utermehle died, and that she never heard of any other will and knows of no other will.

After offering this testimony the attorneys for the plaintiff in error informed the court that it was all of the testimony that they had on the question of estoppel, but that they had a large number of witnesses on the issues of undue influence

and testamentary capacity, and in order to make the record properly show this, the attorneys for the plaintiff in error offered witnesses separately on the other issues in the case. Counsel for the defendants in error objected, and the court, after hearing argument, sustained the objection and instructed the jury on all of the issues to return a verdict for the caveatees on the ground that the caveator was estopped. The colloquy between the counsel and the court and all of the action of the court in this matter appears in the record at pages 158 to 174. Upon an examination of this part of the record it will be seen that plaintiff in error excepted to the ruling of the court refusing to permit the witnesses to testify when offered, and also in instructing the jury as to their answers to the several issues. The court, having sustained the contention of the defendants in error, entered a decree thereafter on the 7th day of June, 1902, confirming the original decree of February 26, A. D. 1889, admitting the will to probate as a will of personalty and and admitting the will to probate as a will of realty.

From this decree an appeal was taken to the Court of Appeals of the District of Columbia, and that court, on the 5th day of May, 1903, affirmed the decree of the Supreme Court, and plaintiff in error then sued out the writ of error to this court.

Assignment of Errors.

1st. The court erred in holding that the appellant, the caveator, was estopped, at the time of the filing of the caveat, from filing the same to the alleged will of George W. Utermehle as a will of personalty.

2d. The court erred in holding that the appellant, caveator, was estopped, at the time of the filing of the caveat, from filing the same to the alleged will of George W. Utermehle as a will of real estate.

3d. The court erred in instructing the jury to return a

verdict against the caveator and in favor of the defendants in error on the issues of estoppel.

4th. The court erred in instructing the jury to return a verdict against the plaintiff in error and in favor of the defendants in error on all of the issues.

5th. The court erred in instructing the jury to return a verdict against the plaintiff in error in favor of the defendants in error, caveatees, on the issues that do not involve the question of estoppel.

6th. The court erred in refusing to permit the caveator to answer the questions contained in the record, which questions call for the statements and declarations of George W. Utermehle, deceased, as to his testamentary intentions towards the caveator, and also in not permitting the caveator to offer evidence of the several conversations that took place between himself and George W. Utermehle as set out in the record on pages 54 to 56, both inclusive, and in refusing to permit testimony to be offered as contained in the offer of proof made by the caveator, which said questions and offer of proof was as follows:

Q. Now, Mr. Utermehle, just tell us in your own way and as fully as you can what your grandfather said to you on that occasion. In the first place, how did you happen to go in his buggy. You say, this was on the occasion when he took you home in the buggy. How did he happen to do it on this occasion?

Mr. Worthington: Mr. Utermehle, please do not state any conversation; you can state the preliminaries and so on, but when we come to conversation I want to object.

A. I did not know that there were any preliminaries to the matter; it was simply a conversation.

Mr. Perry: Well, how did you happen to go in the buggy?

A. He said: "I am going uptown this afternoon and I will take you in when you go."

Thereupon following offer of proof was made:

> "We expect to prove the testamentary declarations of George W. Utermehle in 1877. We expect to

follow that up by proof as to another declaration about the same intentions in 1882. Then we propose to offer the testimony of another witness as to a time somewhere between 1882 and the time of the testator's death, so it is not simply the declarations in 1877 that we expect to prove in answer to this question; but we expect to show a purpose formed at that time and adhered to up to near the time of the death of the said George W. Utermehle."

To which question and offer of proof counsel for the caveatees objected; the court sustained the objection and counsel for the caveator excepted.

And thereupon he was asked the following questions:

Q. I will ask you to state whether or not on that occasion (referring to the conversation in 1877) your grandfather said anything to you with reference to a suit that was then pending in this court, brought by his sisters and others against himself, to which you were defendant?

A. He did.

Q. I will ask you what he said with reference to this suit?

Objection; objection sustained. Exception noted on the ground that the answer would be merely introductory to the main conversation about which it was proposed to interrogate the witness; and, in order to show the object of the conversation, Mr. Perry thereupon made the following offer:

"I offer to prove by this witness here upon the stand, duly sworn, the following facts: On that occasion a suit had been brought in the Supreme Court of the District of Columbia by the sisters of George W. Utermehle against himself and others, as defendants, claiming that he had fraudulently disposed of certain property for which he was trustee under his father's will and in which his sisters had an interest; that the witness, Charles H. Utermehle, Jr., was a party defendant to the said suit; that on the said occasion and during the said ride in the said buggy George W. Utermehle expressed to the witness, his grandson, great anxiety about the suit and requested him, the witness, not to have anything to do with the suit, and then and there told him that if

he would refuse to have anything to do with suit, he, the grandfather, George W. Utermehle, when he came to make his will would leave him an equal share with his daughters of his estate."

The court sustained the objection to the question and offer of proof, and counsel for the caveator excepted. Witness further testified that he had another conversation in the '80's, '81 or '82, and had two or three conversations on the same subject. And then the following offer of proof was made:

"It is offered to prove by the witness that in 1881, the latter part of the year, the testator, George W. Utermehle, said to his grandson, when the grandson, Charles H. Utermehle, Jr., the witness, had spoken to him with reference to his mother's intention to make some improvements upon a certain lot of ground that she owned in this city, that he, George W. Utermehle had a deed of trust upon this said lot and that the witness had better advise his mother not to make any improvements upon it, and then went on to say that the witness, Charles H. Utermehle, Jr., need take no care about his future, as he, the testator, intended to provide for him equally with his other children."

To which offer objection was made by counsel for caveatees and objection sustained, and caveator noted an exception.

Witness further testified that he had another conversation in 1883, and then the following offer of proof was made:

"It is offered to be proved by the witness upon the stand that, in the early part of 1883, the testator, George W. Utermehle, at his house in this city, referring to the general subject of the two preceding conversations, again stated to the witness that he intended, when he made his will, to give the witness his, the witness' father's, share of the estate."

To which offer counsel for the caveatees objected, the court sustained the objection, and counsel for the caveator excepted.

ARGUMENT.

In considering the several assignments of error we shall take up first those which relate to the most important question in this case—i. e., the question of estoppel; then the refusal of the court to admit certain evidence which the caveator attempted to offer and to which objection was sustained. As none of this evidence touches the question of estoppel, the refusal of the court to admit it in no way affected the ruling of the court in peremptorily instructing the jury to return a verdict for the caveatees. It therefore becomes important, before considering this question, to inquire whether there was anything in the record to warrant the court instructing the jury to return a verdict in favor of the caveatees upon all of the issues upon the ground that plaintiff in error was estopped from attempting to avoid the will.

The Question of Estoppel.

The question of estoppel involves the following propositions:

1. Can the defendants in error invoke the doctrine of estoppel in their behalf when one of them is a devisee under the will, and the others claim from a devisee, both of the devisees being charged with exercising undue influence or fraud in procuring the making of the will, and in making false and fraudulent misrepresentations in order to hide their fraud in obtaining the will, to prevent the will from being attacked by the plaintiff in error?

2. Whether, if the plaintiff in error (caveator) was ignorant of the facts surrounding the making of the will at the time that he acted under the will, such action estops him from attacking the validity of the will.

3. Whether, if the plaintiff in error (caveator) acted in ignorance of his legal rights, or was wanting in knowledge

of the rule which compelled him to elect, his acts, under such circumstances, constitute an estoppel. Provided—

4. That as soon as he discovered the facts that were unknown to him, and as soon as he became aware of his legal rights and obligations, he took the proper steps to repudiate his acts committed by him through ignorance. And this last proposition involves the following subordinate questions:

First. How should he repudiate his former action?

Second. Whether under the circumstances of this case the caveator made sufficient tender of the benefits received by him before he filed the caveat or commenced proceedings, or whether the caveator was compelled to make any tender whatever.

Before considering the legal definition of estoppel as laid down in the authorities, we desire to call the court's attention to first proposition.

Proposition I.

"Can the appellees invoke the doctrine of estoppel in their behalf when one of them is a devisee under the will, and the others claim from a devisee, both of whom are charged with exercising undue influence or fraud in the making of the will, and in making false and fraudulent misrepresentations to prevent the plaintiff in error from investigating the facts surrounding the making of the will, this last fraud being merely ancillary to the principal fraud charged."

The record in this case shows that Rosa M. Taylor, one of the original caveatees, is charged with fraud and coercion in obtaining the alleged paper purporting to be the will of George W. Utermehle; and further, that both Rosa M. Taylor and Mamie E. Norment are charged with making fraudulent representations and promises to the appellant in order to prevent him after his grandfather's death from

making inquiry as to the true state of facts surrounding the making of the will, and that Mamie E. Norment knew of the fraud imposed upon the plaintiff in error and was enjoying the fruits thereof. An examination of the authorities discloses that before a party can take advantage of the plea of estoppel he must be an innocent person, and as such innocent person must further do some act by reason of being misled by the conduct of the party alleged to be estopped. The fact is that the whole record is teeming with fraud and misrepresentations of the caveatees or those from whom they claim, and there is nothing in the record at all that in any way shows or attempts to set up any fraud or gross negligence on the part of the caveator. How, then, can these persons who are themselves, according to the record, guilty of fraud, come into court and say that the appellant is estopped from disputing the alleged will as against them, because he did certain acts which he was led into doing by the very misconduct, fraud, and misrepresentations of the parties attempting to set up such estoppel.

It is confidently insisted that such is not the law, and that the appellees have no right, in the present state of the record, to raise any question of estoppel that the court had no right to permit this question to be raised by appellees, who, by reason of their own misconduct, can not be regarded favorably in courts of either law or equity. The Supreme Court of the United States in the case of Neblett *vs.* McFarland (92 U. S. 193), speaking of the right of persons guilty of fraud to invoke the aid of the court, says:

> "Parties engaged in fraudulent attempt to obtain a neighbor's property are not the object of the special solicitude of the court; if they are caught in their own toils and are themselves the sufferers, it is the legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

The Court of Appeals in this case (Utermehle *vs.* Norment, 22 App., p. 31) seems to have misconceived the proposition

here contended for and to have confined the fraud to the conversation alleged to have taken place between the plaintiff in error and the other devisees under the will. It never was the intention of the plaintiff in error to confine the question of fraud to this conversation. It was contended that this conversation was fraudulently had for the purpose of lulling plaintiff in error; but the real fraud contended for in this case is the fraud that surrounded the making of the will, in which fraud the devisee, Mrs. Taylor, and her husband participated, being, according to the contention of plaintiff in error, the prime movers therein, and of which fraud the devisee, Mrs. Norment, had full knowledge, although there is no direct allegation that she participated therein. The conversation had between the parties in regard to plaintiff in error not attempting to disturb the will, is, therefore, merely ancillary to the main proposition of fraud in this case. The question for this court to decide is whether or not the defendants in error, claiming under the devisees and caveatees mentioned in this record, can set up estoppel against the contention of the plaintiff in error to protect them in their title to property that was acquired by fraud. In other words, suppose this will was a forgery and suppose the defendants in error or those from whom they claim knew that the will was a forgery, and, knowing that fact, took title to property under the void instrument, could they, if their title was attacked by the plaintiff in error, invoke the doctrine of estoppel to aid them in their fraud? It is respectfully submitted that they could not and that plaintiff in error has a right to prove as against them the fact showing their fraud.

Proposition II—Ignorance of Fact.

The next propositions that present themselves are those involving the ignorance of facts and of legal rights by the plaintiff in error (caveator) at the time that he apparently acquiesced in the will. We will first take up the question of

ignorance of facts, and then the question of ignorance of rights. It is contended, first, that if the caveator was ignorant of the facts surrounding the making of the alleged will at the time that he acted under the will, his action, while ignorant, in no way estops him from attacking the validity of the will; and in order to consider this question, as well as the second proposition contended for, which is that if the caveator acted in ignorance of his legal rights or was wanting in knowledge of the rule which required him to elect, his acts under such circumstances would not estop him from contesting the validity of the will under which he acted, it is necessary for us to apply the law relative to estoppel to the facts as developed, which have been fully set out in the statement of the case, and will only be referred to briefly in considering the law. Speaking of estoppel Mr. Bigelow says:

> "The cases, when carefully analyzed, show that all of the following elements must actually, or presumably, be present in order to create an estoppel by conduct.
>
> "First. There must have been a false representation or a concealment of the material fact.
>
> "Second. The representation must have been made with *knowledge of the facts.*
>
> "Third. The party to whom it was made must have been *ignorant of the truth of the matter.*
>
> "Fourth. It must have been made with the intention that the other parties should act upon it, and
>
> "Fifth. The other party must have been induced to act upon it."

It will thus be seen that in order to create an estoppel in this case the conduct of the caveator must have been such as to contain all of the elements hereinbefore set out. In other words, he must have made a false representation or concealed material facts, *having at the time knowledge of the facts*, with the opposite party ignorant of those facts, and his action must have been with the intention that the other

party should be misled by it and the other party must have been induced to act upon such misrepresentation.

In the argument of the counsel for the caveatees the only thing claimed by them to work an estoppel in this case was that other parties acted in a way different from in which they would have acted if the caveator had not permitted the original will to stand. No claim was made by them that the record included the other requisites which, according to Mr. Bigelow, are even more essential to the doctrine of estoppel than the one element attempted to be invoked by the caveatees. It is further apparent from the record and on behalf of the plaintiff in error, it is insisted that the question of estoppel in this case is a question of fact which should have been left for determination to the jury. The record as it stands, taking all the testimony as true, shows conclusively that the caveator was ignorant of the true state of facts when he acted under the will; it shows an offer to prove that the other parties were conversant with the facts, and it conclusively shows that the caveator acted in ignorance of not only facts, but of all his rights, and at no time did he perform any act with the intention that the other parties should act upon his conduct; the record, on its face, further shows that the caveatees have not done any act that is in any way prejudicial to themselves by reason of the fact that the caveator took, through ignorance, and fraud practiced upon him, certain property under the will.

In Fisher et al. *vs.* Boyce, 81 Md. 46, the court says:

> "A party can not, either in the course of litigation or in dealings in pais, occupy inconsistent posistions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts. Any decisive act of the party *done with the knowledge of his rights and of the facts*, determines his election and works an estoppel. It is an old rule of equity that one who has taken a beneficial interest under a will is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right

or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will (Bigelow on Estoppel, 562).

"*If, however, a party has acted in ignorance of the true state of facts, he will not, on discovering the truth, be bound by his previous conduct, based upon a state of case essentially different from that which had controlled or influenced his prior action.* In the case under consideration, the record does not show that the appellees, since the will and codicil were admitted to probate, have obtained knowledge of facts previously unknown to them; in fact, have, since the institution of these proceedings, ascertained that the testator was, by fraud or undue influence, induced to execute said papers as testamentary dispositions of his property. It is a maxim in a court of equity not to permit the same person to hold under and against a will. This rule does not, of course, apply to cases as hereinbefore explained, where the party objecting to the will has previously assented thereto without knowledge of the circumstances attending the execution of the will."

In re Miller's Estate, 159 Pa., p. 562, the court, in substance, say:

"The remaining question is over the effect of a receipt by the appellant of some small sums of money paid to him by the executors in compliance with the directions of the will. Is he estopped by the receipt of his money? The general rule is that one who accepts a benefit under a will can not deny the validity of that instrument; he can not affirm the will so far as it is beneficial to himself and deny its validity as to others who are named as beneficiaries (Zimmerman *vs.* Lebo, 151 Pa. 345). But an election in pais to take under a will should be intelligently made and should be unambiguous and positive in its character to amount to an estoppel (Dickinson *vs.* Dickinson, 61 Pa. 401).

"Whether the receipt of money by a legatee claiming to be entitled to receive it, and much more, as an

> heir at law, can be treated as an election to affirm the will, is, to say the least, very doubtful; but if, for the purpose of this case, we leave the conclusion reached by the court below on this question undisturbed, we do not think that the conduct of the appellant is of such a character as to amount to an irrevocable election to take under the will."

The rule seems to be that a legatee who has received his legacy, and afterwards concludes to contest the will, may return the legacy to the executors, and so relieve himself from the operations of the general rule that forbids him to take under the will that which the testator gave him, and at the same time deny its validity as to others.

Speaking of election, the court say:

> "Such election to be binding must be evidenced by unequivocal acts clearly proved, must be made with the full knowledge of the facts; and the burden of showing this is upon him who alleges that an election has been made. It would seem to be a fair deduction from our cases, that where the acts set up are equivocal, or were done in ignorance of the rights of the doer, or where they consist merely in the receipt of a pecuniary legacy and the money is returned before the appellant proceeds beyond the entry of his appeal, they will not amount to an estoppel."

In the above case the appellant was the son and heir of Alexander H. Miller, who left an estate of about one-half a million dollars, and he gave the bulk of the estate to one of his sons and made him executor. The appellant came into the Orphans' Court and by petition asked leave to appeal from the decree admitting the will to probate and asked for the issue of devisavit vel non. He alleged mental incapacity of the testator to make the will and undue influence; and citation was issued and appellant began to take his testimony, and while these proceedings were in progress

the executors moved to dismiss for the reasons set up in their answer. The executors contended that the appellant was estopped from contesting his father's will because his brother had presented a similar petition and it had been dismissed, and that the appellant had been examined as a witness; and, secondly, that having received some small sums from the executors, which the testator had directed should be paid to him, he had affirmed the will and was estopped for that reason also from contesting it.

In the case of Medill et al *vs.* Snyder et al., 61 Kan. 15, the issues were in substance the same as in the case at bar, the issue of estoppel being put in somewhat different words, as follows:

> "When the plaintiff, Nana Medill, received property and money from her father's estate under the provisions of the will and codicil in question in this cause, did she do so in ignorance of her rights and without having knowledge of or being advised of the facts urged by her as grounds for setting aside the said will and codicil?"

The first point contended for was that the caveator, having received and retained property under the will, had recognized its validity and was estopped to deny it. The court say:

> "That is conceded to be the general doctrine, but it can have no application if she acted in ignorance of the facts and her rights in the premises. It is true she did not institute a contest until more than a year after her father's death, and that during that time she proceeded as though the will was valid, accepting and using the property and fund set apart for her as the will provided. Her testimony tended to show, however, that she did not learn the important facts relied on to show testamentary incapacity nor what her rights were until about the time the action was begun. She was acquainted with some of the circumstances cited to show the unsoundness of mind, but there is testimony that many of the controlling facts, indicating incapacity, were unknown

> to her, and that she did not understand or learn that she could attack the will on such grounds until about the time the action was taken. As soon as she learned the facts and understood her rights, she challenged the validity of the will and tendered back what she had already received under the will. It would seem from the testimony that her conduct did not induce a change of position by Sherman Medill, nor operate as a fraud upon him, and it can not if all that she receieved under the will is restored to the estate."

The case of Lee *vs.* Templeton, 73 Indiana, 317, is a case identical with the case at bar, and in that case the court held that the caveators were not estopped from disputing the validity of the will from the fact that they attempted to assert its validity when they were ignorant of the facts surrounding the making of the will. The court, in that case, say:

> "But the estoppel is not created unless the acts or declarations constituting it are plainly inconsistent with the rights which they are alleged to have barred, and were made with full knowledge of its existence. . . . Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies.
>
> "An application of the doctrine thus laid down to the case before us shows that the paragraph in question was insufficient for the reason, if for no other, that it does not show that either the plaintiff or his wards, at the time of the proceedings in the partition suit, had any notice of the mental unsoundness of the testator, at the time of the execution of the will, and its consequent invalidity. Without such notice it is clear, on the authorities, and on general principles in respect to estoppels in pais, that the proceedings in partition can not estop the appellees, on behalf of his ward, to contest the validity of the will."

In the case of Fletcher *vs.* Holmes, 25 Indiana, 469, the Supreme Court of that State consider the doctrine of estoppel and hold that a person who acts in ignorance of the true facts can never be estopped by his conduct. The court say:

> "The doctrine of estoppel in pais rests upon a reasonable and just foundation. For the prevention of fraud the law will hold a party to be concluded by his own act or admission. Surely this can have no application where everything was equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the party seeking to conclude him was in no degree influenced by the acts or admission which are set up. Estoppel in pais, unlike technical estoppels by deed or matter of record, never exists without reference to the moral qualities of the conduct alleged."

In the case of Andrew *vs.* Lyons, 11 Allen, p. 350, the Supreme Court of the State of Massachusetts, in considering the question of estoppel, say:

> "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It was not quite properly so called, but it operates as a bar to receiving evidence contrary to that representation, as between those parties. Like the ancient estoppel, this conclusion shuts out the truth, and is odious and must be strictly made out. The parties setting up such a bar to the reception of the truth must show that there was a wilful intent to make him act on the faith of the representation, and that he did so act."

In Brant *vs.* Virginia Coal Co., 93 U. S., p. 335, the Supreme Court of the United States, speaking of the case before them, say:

> "It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that

doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all of this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by the very learned judge that the cases on this subject go to this result only, that there must be positive fraud or negligence so gross as to amount to constructive fraud. . . . And it would seem that, to the enforcement of an estoppel of this character with respect to the title or property, such as would prevent a party from asserting his legal rights and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, must be clearly established. . . . It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In Henshaw *vs.* Bissell, 18 Wall. 271, the Supreme Court of the United States, speaking of estoppel, say:

"An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. *Conduct or declarations founded upon ignorance of one's rights,*

have no such ingredient and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights, but these are exceptional and do not affect the correctness of the general rule as stated."

In the case of Farmers, etc., Bank *vs.* Farwell, 19 U. S. App. 262, the U. S. Court of Appeals held that knowledge of the true facts was essential to work estoppel against a party.

In Halloran et al. *vs.* Halloran et al., 137 Ill., p. 112, speaking of an instruction in that case, the court says:

> "An acknowledgment by the complainants of the validity of a sale, and of the rights acquired by the purchaser thereunder, may or may not work an estoppel, according to the circumstances. It certainly would not *unless made with full knowledge of all the facts;* but such knowledge is not a part of the hypothesis of the instruction."

A party is not estopped by an admission made in ignorance of his rights induced by an innocent mistake of material facts.

Clinton *vs.* Haddan, 50 Conn. 84.

One of the strongest cases on this question of estoppel is that of Taylor *vs.* Cussan, 90 Va., p. 43, where the court quotes at length the definition of Judge Story, and also the five elements required by Mr. Bigelow in his definition.

See, also, Cumberland C. & I. Co. *vs.* Sherman, 20 Md. 117.

On the question of laches raised by the court below it is only necessary to say that in this case the caveator could, under the law, file his caveat or bring his action of ejectment at any time within twenty years from the death of

George W. Utermehle; that at the time that he filed his caveat to the will, as far as realty is concerned, *probate thereof had just been asked*, and that he could not have before this time questioned the will as a will of real property except by an action of ejectment.

In the case of Barbour *vs.* Moore, reported in 4 App. D. C. 535, the action of ejectment was not brought until nine years after the making of the will, and this was not considered laches.

The latest case and a most pertinent one on this question of laches is that of Magee *vs.* Welsh, 18 App. D. C., p. 177, where the Court of Appeals overruled a demurrer to a bill, which bill was filed June 23, 1900, to vacate a deed of real estate dated July 1, 1843 (over fifty-six years before), charging that the deed was fraudulently made by the ancestor of the complainants, the ancestor dying May 23, 1891. The bill averred the fact that the complainants only suspected the fraud within three years of the commencement of their suit, and had no actual proof of it until within one year. The court held that the parties were not guilty of laches.

In this case the caveator offers to show that George W. Utermehle was incapable of making a will at the time that he made the paper in question, and also that the paper was made under the undue influence of the caveatees; that plaintiff in error obtained no knowledge of this until some time early in the year 1900, when he immediately filed his caveat. It was suggested by the court that a different rule might apply on the ground that he had elected to take under the will, and should have inquired into the facts concerning the making of the will. This doctrine is unsound because the caveator is not here invoking the aid of the court to assist him in doing something which he may not have the right to do, but he is in court claiming his legal rights, and the caveatees are setting up as a defense the alleged estoppel; the caveator shows

conclusively on the record why he was unable to discover the facts before he did, and although the record shows that he was lulled to sleep by certain promises of the caveateas, still having brought his action within the time prescribed by the statute of limitations, it is immaterial, as far as this case is concerned, when he discovered the fraud, provided he did not do any act to ratify the will after such discovery.

In the case last referred to, the Court of Appeals say:

> "Moreover, if the right of the appellants to institute inquiry and to take action is to be dated from May 23, 1891, when Catherine Ann Whelan died, and their title accrued, *they would be far within the statutory period within which their title, if a legal one, could be enforced at common law, and within which, therefore, the doctrine of laches would enforce no bar in equity.* Furthermore, it is true that where there are distinct charges of fraud, and it appears that the suit has been instituted within a reasonable time after the discovery, laches will be no bar (Story's Equity Jurisdiction, section 1520; Michoud *vs.* Girod, 4 How. 503; Badger *vs.* Badger, 2 Wall, 87)."

Upon examination of authorities it will be found that where a person claims title to real property the doctrine of laches can never be invoked where a proceeding is taken within the statutory period.

It will, therefore, be seen, upon an examination of the authorities cited, that in order to estop the caveator by his acts it is absolutely necessary that he should be fully acquainted with all of the facts surrounding the making of the alleged will, and that if he were not so acquainted no action of his can in any way estop him, for there is wanting the knowledge primarily necessary to work an estoppel. He can not be held to be guilty of laches, for the authorities show conclusively that laches are never imputed to a person who has instituted his action within the statutory period, and should there be anything to determine in this connection it is necessarily a question of fact which must be dealt with

by a jury and not by a court. In the case of Pence *vs.* Langdon, 99 U. S. 578, the Supreme Court of the United States say:

> Acquiescences and waivers *are always questions of fact. There can be neither without knowledge.* The terms import this foundation for such action. *One can not waive or acquiesce in a wrong while ignorant that it has been committed.* Current suspicion and rumor are not enough; there must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable despatch. He can not rest until the rights of third persons are involved and the situation of the wrong-doer is materially changed. Under such circumstances he loses the right to rescind and must seek compensation in damages. *But the wrong-doer can not make extreme vigilance and promptitude conditions of rescision.* It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership and by which he has not been affected. *The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.* Again, in order to displace the title of a party to relief on the ground of his delay and acquiescence, *it lies upon the defendant by distinct and explicit evidence to bring to the plaintiff the knowledge of the fact on which the acquiescence is founded and to which he refers.*"

It is thus seen that acquiescences and waivers are questions of fact, and so, also, is the question of estoppel, yet in this case it is contended by defendants in error that, taking all of the facts as set out in the bill of exceptions, the plaintiff in error is estopped. In order to establish any such contention, it is absolutely necessary for the court to undertake to weigh, throw out, or disbelieve the testimony of the plaintiff in error himself, for he testifies when he first acquired knowledge of the facts surrounding the making of his grand-

father's will, and states that up to that time he had no knowledge of the undue influence exercised over his grandfather. How, then, can the court say in this case that the plaintiff in error had knowledge when he, himself, denies that he had knowledge of the facts as well as knowledge of the law? In other words, the court below by its ruling says: Although upon a motion to instruct the jury all of the facts must be conceded, still when determining this question, I find that the plaintiff in error, caveator, did not state the truth when he said that he had no knowledge either of facts or law. Every inference that may be drawn from the testimony in his favor, according to the authorities, is to be given to a party in deciding the question whether or not the jury shall be instructed to return a verdict against him, and still the court in this case disregards that principle of law and refuses to give the testimony of plaintiff in error the consideration that he is entitled to have given to it.

It is therefore respectfully insisted that as the plaintiff in error was ignorant of the facts surrounding the making of the will, the court had no right to arbitrarily find otherwise; that the whole question was one which should have been submitted to the jury upon proper instructions, and the jury should have been permitted to say, upon all the evidence, whether or not the plaintiff in error was estopped. In other words, after the caveator had given his testimony on the question of estoppel, as well as on the other questions involved in this case, the defendants in error should have given their testimony and the jury should have determined, from all the facts the question of estoppel, as well as the other questions involved in the case, and in determining the question of estoppel the authorities hold that the burden is on the person setting up the estoppel to show its existence. It is in the nature of an affirmative plea setting up affirmative facts, which facts must be proved by the party alleging them.

Proposition III—Ignorance of Law.

It is contended that if the caveator acted in ignorance of his legal rights or was wanting in knowledge of the rule which compelled him to elect, his acts under such circumstances did not constitute an estoppel. This question is raised in the record not only upon exception to the ruling of the court in its instructions to the jury, but upon the ruling of the court as to the admissibility of certain questions put to the caveator as to his knowledge of his legal rights and as to his knowledge of the rule which compelled him to elect. The rule of law that estops a party from setting up the truth, being a harsh rule, is necessarily strictly construed, and the authorities hold that conduct or declarations founded upon ignorance of one's rights do not estop a person. In Henshaw *vs.* Bissell, 18 Wall. 271, the Supreme Court of the United States, speaking of estoppel, say: "Conduct or declarations founded upon ignorance of one's rights have no such ingredient and seldom work any such result." In the case of Medill et al. *vs.* Snyder et al., before referred to, the very issue of estoppel in that case involved the question of whether or not the caveator took under the provisions of the will in ignorance of her rights. The leading case on this question is that of Watson et al. *vs.* Watson, 128 Mass. 152.

That court, speaking in the case where a legatee had returned a legacy on the ground that he was ignorant of the rule of law that compelled him to elect, and also speaking of estoppel, say:

> "But the doctrine, whether applied in practice on the common law or on the equity side of the court, depends, not upon the technical rules, but upon principles of equity and justice and upon actual intention. An election made in ignorance of material facts is, of course, not binding when no other person's rights have been affected thereby. So if a person, though knowing the fact, has acted

> in misapprehension of his legal rights and in ignorance of his obligation to make an election, no intention to elect and consequently no election is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few."

Therefore the court came to the conclusion that a person accepting and holding a beneficial interest under a will can not, either in equity or law, assert an independent title in other property against the will, but that, after having received a legacy in ignorance of this rule, he may, upon being informed of the rule, return the legacy to the executor and give him notice that he elects not to take it, and the rule will not apply.

See, also, Spread *vs.* Morgan, 11 H. L. 587.
Wheeler *vs.* Smith, 9 How. 55.
Sparlook *vs.* Brown, 91 Tenn. 261.
Williams *vs.* Williams, 63 Md. 371.

The case of Spread *vs.* Morgan, above cited, follows the reasoning of the Massachusetts case and has applied the same rule to the doctrine of election and estoppel, the two courts, i. e., the House of Lords and the Supreme Court of the State of Massachusetts, hold that a party must have knowledge, not only of facts but also of his legal rights, and as is said in both of these cases, it is necessary that a party have *knowledge of the law in order to make an election binding upon a person making it.*

It is therefore contended that not only was the evidence offered as to the caveator's knowledge or want of knowledge of his legal rights and the doctrine of election, admissible, but that the court erred in instructing the jury to return a verdict for the caveatees in the very teeth of such evidence, for if, as contended by the caveator, such testimony was admissible, then it was absolutely impossible to invoke the doctrine of estoppel as matter of law against the caveator,

for the record conclusively shows that he had no knowledge whatever of the existence of this doctrine at the time that he took the bequest and devise under the will, and not having knowledge of the doctrine and such knowledge being essential according to the authorities to work an estoppel, it was error in the court to hold that the caveator was estopped. Now, contending as we do, on account of his ignorance of *facts* and of his *legal rights* that the caveator was not estopped by reason of the fact that he received certain devises and bequests under the will of his grandfather, we come to consider the fourth proposition.

Proposition IV—Tender.

'In considering the fourth proposition it is necessary for us to consider what action should have been taken by the plaintiff in error (caveator) as soon as he discovered the facts concerning the making of the alleged will and was informed of his legal rights. In other words, how should he repudiate his former acts? Did the circumstances of this case as set out in the record compel the caveator to return not only the benefits received under his grandfather's will, but also those received under the will of his grandmother, before the filing of the several caveats when there was, at the time, no personal representative to receive the benefits if an offer were made to return them, and when, without any regard to the decision of the issues in this case, the caveator would be entitled to receive more property than he had already received; and when, after an offer to return and account, he, the caveator, immediately received notice from the solicitors for the caveatees that they would give up nothing unless compelled to do so in court, the caveatees thereupon immediately filing a petition in the office of the Probate Court, asking that the will be probated as a will of real property. Under these circumstances the final question to decide in determining the

right of the caveator to contest this will is whether or not he was compelled to make any tender whatever, and further, whether or not the tender and offer made before the caveat was filed and by him in his pleadings set forth was not a sufficient repudiation of his rights under the alleged will of his grandfather, which placed him in the position where he could contest the validity of the alleged will.

Before considering what the law requires the caveator to do, it is necessary to consider exactly what he did. According to the testimony, when he learned of his rights in the matter, as well as of the facts surrounding the making of the alleged will, he made a tender in writing to the caveatees of all benefits that he had received under the will of George W. Utermehle, and he was, at the time, according to the testimony, able to carry out the offers made in the several letters to the caveatees; he had sufficient money to tender to them, and he had an option on the property which he had received under the will and which he had sold prior to discovering the facts surrounding the execution of the will. At the time the letters were written, and after that time, he was able and ready to make good the tender. No further steps were taken on account of the fact that a day or two after the letters were written his attorneys were informed that the caveatees would accept nothing; they would fight and would not receive or give anything unless compelled to do so. Immediately thereafter they filed a petition in the Orphans' Court, asking that the will be admitted to probate. The testimony further shows that George W. Utermehle left no other will than that here in controversy and that if he had died intestate caveator would have been entitled to one-third of his real property; that his real property was valued at about one million dollars and was left, with the exception of one piece, to the caveatees, and that the caveatees substantially hold all the property at the present time, save that the caveatee, Mrs. Norment, transferred without consideration a

large portion of her share to her children, retaining, however, more than one hundred thousand dollars worth of real estate the title to which was derived by her under the alleged will.

The evidence in the case further shows that the caveatees and caveator each received one-third of the property under the will of Mrs. Utermehle, as if Mrs Utermehle had died intestate, and that in his pleadings the caveator offers to account for everything that he received under that will. It is therefore insisted that the caveator did everything possible to put the parties in statu quo, which is all that is necessary to give him a proper standing in court.

He is not in the position of saying:

> "I have certain property which I intend to keep and which I derived under and by virtue of certain instruments, but I intend to destroy the effect of these instruments."

In this position he would have no standing, because the record would show that he elected to hold his property by virtue of the instrument that he was attempting to destroy, but he says:

> "I have certain property in my possession which I am ready and willing to give up and to account for; you have a large amount of property in your possession belonging to me; the instrument under which I received my property is void and I do not claim to hold it under that instrument, but am ready and willing to account to you and insist that you give me my share without any regard to the instrument."

The party making such a statement does not stand in any inconsistent position, and places the other parties in such a position that they will lose nothing by reason of the fact of his having received certain property in ignorance.

What Tender Was Necessary?

In considering in this connection the propositions of law that arise from the facts in the record, we will first ask whether or not, on account of the condition of the property, it was necessary for the caveator to make any tender other than an offer on his part to account for anything that he received from the estate of George W. Utermehle. And, secondly, whether or not it was necessary for him to do anything more than he did on account not only of the condition of the property, but on account also of the action of the caveatees?

Before considering the first proposition, it is necessary to state that the letters sent and the pleadings in this case aver a readiness and willingness on the part of the caveator to account to the caveatees for all of the property that came into his hands, and which at one time or another belonged to George W. Utermehle.

While the caveator has in his pleadings offered to account for all the property he received from his grandmother, it is only necessary to say that both he and the caveatees took equal portions of that property and the same portions that they would have taken if there had been no will either of the grandfather or grandmother, so that the offer to account for that is merely stated to show, if it be necessary, that caveator is ready to treat that property as if there had been no will.

First. Was it necessary for the caveator, on account of the condition of the property, to make any tender other than an offer on his part to acoount? In other words, was caveator compelled in this case to offer restitution, or make restitution, to the caveatees when they, the caveatees, had in their possession property which would belong to himself if the will were not broken and for which he was willing to account to the caveatees if the will were broken?

Here it becomes necessary to consider the origin of the rule of estoppel or election that is applicable in a case of this

character. The rule is not one that is applicable to wills merely, but it applies to all classes of instruments and all situations of parties. The law will not permit a person to maintain an inconsistent position, and when a person has acted under an instrument, through ignorance, he must, as soon as he discovers the true facts, repudiate the instrument and, as far as possible, place the parties in the same situation they were in prior to the making of the instrument, and, therefore, when a person has received a benefit under a will and afterwards claims the right to attack that instrument, he can not at the same time claim to hold what he has received by virtue of the instrument; in other words, he must elect. Election does not require, however, in all cases a surrender, nor does it work a forfeiture; it is not an unbending rule; it is a rule that springs from manifest principles of equity, intending to do justice to all parties concerned. It is well settled that the doctrine of election is as well satisfied by compensation as by forfeiture. In that way justice is done to all. Thus, a disappointed legatee may say to the devisee:

> "You are not allowed by a court of equity to take from this estate that which you would otherwise be entitled to until you have made good unto me the benefit the testator intended for me."
>
> Farmington Savings Bank *vs.* Curran 72, Conn. 349.

And, as before stated, this rule of election or estoppel is not confined to wills. Lord Redesdale held that this rule of election was applicable to every species of instruments, whether deed, will, or other writing, and that the rule could be applied in a court of law as well as a court of equity. Thus, this rule is applied, by the Supreme Court of the United States, in the case of Rabb *vs.* Voss, 155 U. S., 13, in a case at law, and also by the court in the case of Smith *vs.* Gilmore, 7 App. D. C. 192. Those authorities lay down

the proposition that a person can not at the same time hold inconsistent positions; he can not contend for something and at the same time try to repudiate the ground upon which he bases his contentions. Upon an examination of the authorities, it will be found that there is no case where a court has decided that a caveator, an heir, must turn over property to caveatees, other heirs, they also having property from the ancestor, when the heir, the caveator, intends to contest the will; all the courts have decided is this: that a legatee must tender to the executor the legacy received before he can contest the will, and that a devisee must make an offer of tender in his bill for partition of the estate with the other heirs, for nothing is clearer or more certain than the only thing that a party is required to do is substantial justice, and a party can not claim benefits or emoluments by virtue of a will, deed, or other contract and then attempt to gain other benefits by repudiating the will, deed or contract. But there is no rule of law that requires a party to give up that which he can rightfully keep without injuring any one to some person who is not entitled, as a matter of justice and equity, to receive the same.

While we can find authorities without number which speak of the return of the consideration, the restitution of a legacy, still, upon an examination of them, we will find that in those cases there was no contention raised as to whether or not the consideration must be actually returned or the legacy restored.

In the case of In re Peaslee's Will, 25 N. Y. Supp. 940, an attempt was made to contest a will without making a tender or an offer to tender the legacy received under the will. The court adopted the general principle of law and stated that it is a well-settled proposition that a person who accepts or retains a benefit under an instrument, whether deed, will, or other writing, is held to have adopted the whole and to have renounced every right inconsistent with it. In that case the appellant urged that the reason

for the rule did not apply, because no injury could result to the executor, for if the will were broken the caveator would be entitled to receive a larger sum of money, and, therefore, that the executors were amply protected. The court, however, say :

> "It may be true that if the contest should proceed it would so turn out, but of that we are not sure. It does not appear that should the petitioner be successful in her contest as a result, *her mother's intestacy* will be established. There may be other and prior wills in existence, the validity of one of which may be established with the possible result that the petitioner will not receive thereunder a legacy sufficient in amount to make good the advance to her by these executors; certainly the contrary can not be safely assumed. The fact that the petitioner received this money and expended it before becoming aware of the fact, which encouraged her to enter upon a contest of the will may, perhaps, be unfortunate for her. If misfortune it be, it arises, of course, from the necessities which induced her to expend the money. Where a person asks that the rule be not applied on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the fact which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the result may be, no one can be the loser because of the payments originally made to her, she is not in a situation to attack a will."

In this case we have shown that there is no executor who could receive this money; that the caveatees have received some hundreds of thousands of dollars more than the caveator; that there is no other will and that the caveator has made such tender and offer that the parties are put in a position where, whatever the result may be, none of the caveatees can in this case be the loser because of the payments originally made to the caveator, and, therefore, the

caveator, in this case, comes within the exception laid down in the New York case. The caveatees in this case are charged with fraudulently using undue influence in obtaining this will. In considering the question of attempting to place parties in their original position where a bill was filed to vacate a conveyance on the ground of fraud, the Supreme Court of the United States, in Neblett *vs.* McFarland, 92 U. S. 103, say:

> "In cases of this character the general principle is that he who seeks equity must do equity; that the party against whom relief is sought should be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed, as far as possible, in the situation in which they would have stood if there had never been any such transaction."

Further on the court, however, say:

> "Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the object of the special solicitude of the court; if they are caught in their own toils and are themselves the sufferers, it is a legitimate consequence of their violation of the rules of law and morality. Those who violate these laws must suffer the penalty."

It will be noticed that the authorities apply this rule of election or estoppel in the same manner to a deed, will, or other writing.

In the case of Judge of Probate *vs.* Stone, 44 N. H. 593, A, by fraud, obtained an assignment from B of all his interests in a large estate, of which A was administrator, A paying $4,000 therefor. B, without discovering the fraud, spent all of the money and thereafter died. His administrator, upon discovery of the fraud, rescinded the contract, and at that time A had in his hands a large amount of money, as administrator, more than four thousand dollars of which would have belonged to B had

B not assigned his interest. The court held that the administrator of B had a right to rescind the contract and bring suit for the money without paying back or offering to pay back the $4,000, leaving A to deduct the amount paid to B for the assignment from the moneys he had in his hands belonging to B.

In speaking of the question, the court say:

> "Either Cooper (B) or his administrator might on the discovery of fraud rescind the contract, but it must be rescinded immediately upon such discovery. If Cooper (B) did not discover it in his lifetime, then his administrator, upon such discovery, might rescind or ratify. He could not do both; and if he elected to rescind he could only do so by placing the defendant in the same position in which he was before the assignment was made; but the defendant can not complain if he obtained the deed by fraud and then kept the said Cooper (B) in ignorance of it until he had expended all of the money he had received and then died, and an amount of money belonging to the estate of the said Cooper (B) had come into the administrator's hands larger than the amount he had so paid."

The court held that the administrator, when sued by the administrator of B, had a right to reserve or have deducted from the sum due the administrator of B the amount of $4,000. The court held, however, that if the administrator of B, when he made demand and brought his suit, intended to make the defendant pay over the whole amount of money in his hands, without either paying him or allowing him to deduct the $4,000, then there was no rescision of the contract, and the administrator of B could not maintain his suit.

In Medill et al. *vs.* Snyder et al., 61 Kan. 15, the court, after considering the facts, say:

> "As soon as she (the petitioner) learned the facts and understood her rights, she challenged the validity of the will and tendered back what she had

> already received under it. It would seem from her testimony that her conduct did not induce a change of position by Sherman Medill, nor operate as a fraud upon him; and it can not, if all that she received under the will is restored to the estate."

The court again say:

> "Here the legatee who accepted the benefits has offered to restore what was received, and, as we have seen, no one can be prejudiced or be the loser by her conduct."

The court, considering the offer of restoration, as set out in the petition, say: "The offer of restoration, made by Nana Medill, in her pleading, was sufficient in a case of this character." And in support of that statement is quoted the case of Thayer *vs.* Knote, 59 Kan. 181, in which case the court considers the general rule necessary for the rescision of a contract, which is to make a return or tender of what a party has received. The court, speaking generally of the offer to restore all received under the contract, say:

> "The plaintiff in error offered to restore the consideration paid for the instrument of the assignment and interest on the same. Objection is made that this offer should have preceded the bringing of the suit. It is usual in such cases to make the necessary tender before the institution of the proceeding, but equity will not refuse relief because it was not then done; equity only requires a suitor to do equity, not necessarily in the first instance, except in his bill to offer to do it."

In the case of Wheeler *vs.* Smith et al., 9 How. 55, a bill was filed to set aside a release made by the complainant. The case was heard on bill and demurrer. It appears from the allegations in the bill that the complainant had received a large sum of money and had released his rights in the estate of Charles Bennett, he being paid for such release the sum of $25,000. The bill alleges the willingness

to account for the money already received, and further asks that the trustees pay to him the whole amount coming to him from the estate of Charles Bennett. The court sustained the bill and held that the complainant was ignorant of his rights at the time he made the release, and therefore the same could be set aside. There was no attempt to pay back the twenty-five thousand dollars before the filing of the bill, but there was a mere allegation in the bill, stating the willingness of the complainant to account.

Again, in the case of Montgomery *vs.* Pickering et al., 116 Mass. 227, in which a bill in equity was filed to compel the reconveyance of a parcel of land on the ground that the conveyance was obtained through fraud and mistake, the court, after holding the conveyance fraudulent and finding that the defendants had in their possession a sum of money belonging to the complainant, said:

> "Nor was there any necessity upon the facts disclosed for the plaintiff to restore, or offer to restore, the defendants to the position in which they were before the deed was executed. By the payment made to her upon the delivery of the deed, the plaintiff took nothing from the defendants that she was not entitled to receive, and there was nothing therefore on her part to be restored."

Mr. Bigelow, in his work on Fraud, page 424, says:

> "The right to insist upon tender is not an arbitrary right; on the contrary, it will yield to circumstances which show that it would be either unjust or idle to require it."

This would seem to decide the exact point here in controversy. Would it not be unjust to compel the caveator to hand over to the caveatees property which, without any regard to the decision in this case, belongs to the caveator? Would it not be an idle ceremony to require the caveator to hand over to the caveatees property, when they, the

caveatees, have in their possession hundreds of thousands of dollars that will, if the contention of the caveator is sustained, belong to him, and when they, the caveatees, could have no interest in the property now in the hands of the caveator, or property that he is supposed to have acquired under the will, other than a part interest for which the caveator is ready to account?

This right to bring suit before a rescision of the contract and tendering back of money received was considered by the Court of Appeals in Howard *vs.* The Railroad Co., 14 App. D. C. 297. In that case the court held that the tender of money at the trial table before the case went to the jury was a sufficient tender upon the rescision of a release obtained by fraud. The court said:

> "The rule that one who seeks to avoid on the ground of fraud a release of a claim of damages for personal injuries must return the amount received under it, is satisfied by the tender of the money on the trial before the case is finally submitted to the jury."

In Lyon *vs.* Allen, 11 App. D. C. 549, the Court of Appeals held that a tender was absolutely necessary. They say:

> "It is no answer to the objection that the money has not been returned nor offered to be returned; that the amount received by the plaintiff under the release has been discounted from the verdict. Suppose the verdict had been found for the defendants because of insufficient proof of negligence on their part or because of contributory negligence on the part of the plaintiff. What would have been the predicament of the defendants in respect to the money paid under the release? Clearly they would have no recourse to recover it back from the plaintiff. The plaintiff can not be allowed both to affirm and disaffirm according as the case may terminate. He can not affirm for what he has received and disaffirm

> and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict. He must disaffirm and rescind the release in toto if the facts justify him in doing so, and return or offer to return what he has received under it before bringing his action."

This decision of the Court of Appeals would seem to be at variance with the decision of the Supreme Court of the United States in the case of the Union Pacific Railroad Company *vs.* Harris, 158 U. S. 326, where the Supreme Court of the United States permitted the jury to deduct from the amount they should find for the plaintiff the amount paid for the release signed by the plaintiff, provided, of course, the release was obtained through fraud. The Supreme Court considered the settlement made by the parties a legal adjustment of their rights if the settlement or agreement was valid, and, if not, that then the money paid for it was the money of the defendant and should be deducted from the verdict. The rule here laid down clearly sustains the contention of the caveator. If the property received by the caveator would not, under any circumstances, belong to him, then, according to the decision of the Court of Appeals, he should tender it back; but, taking the reasoning of the Court of Appeals and applying it to this case, the caveator would be permitted to disaffirm the contract without tendering or offering back what he had received, because in a proper settlement of the case the caveatees would be entitled to have what he received charged up against him, and, if the caveator lost, the caveatees would have no interest whatever in the property in the possession of the caveator; and, taking the decision of the Supreme Court of the United States and applying it to this case, the caveator could repudiate the will and in the final settlement between the parties have what interest of theirs he received charged against him.

The decision of the Supreme Court of the United States is supported by the following authorities:

Girard *vs.* Carr Co., 123 Mo. 358.
Westlake *vs.* St. Louis, 77 Mo. 47.
O'Donnell *vs.* Clinton, 145 Mass. 461.
Smith *vs.* Holyoke, 112 Mass. 517.
Mullen *vs.* Old Colony R. R. Co., 127 Mass. 86.

It might be well here to review a few of the cases where the courts have required a repayment of the legacy. In the case of Hamblett *vs.* Hamblett, 6 N. H. 333, the court granted a motion made by an executor to compel the party contesting a will to pay the money, received by him as a legacy, into court. The court say:

> "*The security of the executor may require this*, and if the party can withhold it, he might, at one and the same time, treat the will as valid as to that portion of the estate to which he would be entitled under it and invalid as to the other property. In ordinary cases, therefore, where a party seeks to repudiate a will, as insufficient, he must do so wholly and entirely by refusing until it has been established to receive the benefits of it, or, if anything has been received, by returning it to the executor or placing it in the custody of the court, that the executor may have it in case the judgment may be against the validity of the will."

In Holt *vs.* Rice, admr., 54 N. H., 398, the Court made an order of the same nature.

In Miller's Estate, 159 Penn. State, 562, the court lays down the general proposition that one who accepts a benefit under a will is estopped from attacking its validity; that such party can not confirm the will so far as it is beneficial

to himself and deny its validity as to others who are named as beneficiaries. The court, however, say:

> "*Whether the receipt of money by the legatee, claiming to be entitled to receive it, will be treated as an election to confirm the will, is, to say the least, very doubtful.*"

In Fisher *vs.* Boice, 81 Md. 46, the court adopts the general rule and says that a person who does not elect with knowledge of all the facts does not come within the general rule.

In Madison et al. *vs.* Lamon et al., 170 Ill. 82, one of the few cases in which this question of estoppel arises between heirs, the court held that certain of the complainants could not maintain a bill for partition because they were beneficiaries under the will that they were attempting to attack. The court say: "They could not take, under the will, as devisees and then contest it as heirs at law." There was in this case, however, no offer on the part of the complainants to account for what they had received under the will or to repudiate the bequest to them under the will.

In re Soule's Will, 3 N. Y. Sup. 29, the court held a tender made of money received for a legacy during the trial of the case, insufficient. Upon an examination of that case it will appear that there was, first, a dispute about the probate, which was compromised, and payments were made under the compromise, and, that afterwards, without alleging any fraud, mistake, or ignorance, a caveat was filed. The court, in its opinion, treats the tender in that case as coming under the ordinary law of tender, and does not attempt to draw any distinction between a tender in a case of this kind and in any other suit.

In the case of Chipman et al. *vs.* Montgomery et al., 63 N. Y. 228, the action was in the nature of a proceeding for the construction of a will. Certain parties sought to overthrow the will and claimed the property as though the maker thereof died intestate. The court, while laying down the general rule, speak of the return of all that has been

received by legatees, but, while doing that, they use the following language:

> "A person can not accept and reject the same instrument. Courts of equity proceed upon a theory that there is an implied condition that he who accepts a benefit under an instrument shall adopt the same in all its provisions and renounce every right inconsistent therewith."

It will thus be seen, from these authorities that a tender is not necessarily a condition precedent to a proceeding to rescind or annul a will, deed, or other writing, but that the whole and only object of the tender is to place the parties in such a position that no one will be injured; and that where a person repudiates an instrument he may offer in his pleadings to restore that which he has when such offer places the parties substantially in the same position that they would be in if the instrument had never been executed.

Second. Was it necessary for the caveator to do anything more than he did, not only on account of the condition of the property, but on account also of the action of the caveatees?

We have considered generally whether or not a tender was necessary on account of the condition of the property and the manner in which it is held by the caveatees, and we come now to ask whether or not, in view of that condition, the action of the caveatees was not such as to waive all right to a tender. They had what caveator wanted; caveator had very little that they were entitled to, which very little they did not want; caveator offered to account; caveatees never answered the letters; caveator was ready and willing to tender; caveatees, according to the record, were ready to fight, and caveator was informed of that readiness. Should caveator, under circumstances of this kind, have attempted to further communicate with the caveatees and have done that which would have been a vain and useless act?

As said by Mr. Bigelow, p. 424, before quoted:

> "The right to insist on a tender is not an arbitrary right; on the contrary, it will yield to circumstances which show that it would be either unjust or idle to require it."

Again, where the defendant refuses, when a person offers to tender money, to receive the money, it is not necessary that the money should be actually produced.

> Barker *vs.* Parkinhorn, 2 Wash. C. C. 144.
> Hazzard *vs.* Barnabas, 10 Cush. 67.

The above case was a tender at law which was, under the rules of common law, somewhat technical. If the suit were a proceeding in equity to avoid an instrument, it would not be necessary that a good tender, such as required by law, should be made, for no such tender is required in a court of equity.

> Parkington et al. *vs.* Turvis, 128 Ind. 186.
> Shuee *vs.* Shuee, 100 Ind. 477.

Again, where a party to a contract where specific performance is sought refuses the performance and insists that he is not bound by the contract, no tender of the purchase money need be made before bringing the suit. The court say:

> "We do not understand that a court of equity, even in the first instance, requires the tender of money to be made when, from the facts and circumstances of the cause, it is apparent that a tender would be useless, and the receipt of the money refused by the opposite party. In this case the appellant has from the outset resisted a performance of the contract and insisted that it was not binding upon him. Any tender to him, while occupying this ground of defense, would have been an idle ceremony. He would have nothing to do with the money and he would not have compromised his

rights by receiving it. This must be obvious to everyone."

Wright *vs.* Young, 70 Am. Decisions, 453.
Hazzard *vs.* Loring, 10 Cush. 67.
Dorsey *vs.* Barbee, 12 Am. Dec. 296.

Again, the law never requires a person to do a useless thing; and, applying this principle, we are of the opinion that the absolute and unqualified refusal of a defendant to accept an assignment relieves the plaintiff of the duty of making a formal tender of a written transfer. What good could have resulted from it?

McDonald *vs.* Wolf, 40 Mo. App. 308.

Speaking of the tender that is necessary to be made in order to entitle a vendor to rescind a contract and recover the purchase money, the Supreme Court of the United States, after considering certain authorities on that question, say:

"From these authorities it may be laid down as a settled rule of law that to entitle a vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified, and this averment must be sustained by the proofs unless the tender has been waived by the purchaser."

Bank of Columbia *vs.* Hagner, 1 Pet. 467.

Again, speaking of this question, in the case of Chaney *vs.* Libby, 134 U. S. 81, the Supreme Court say:

"Indeed, after the surrender by Chaney in 1885 of the notes due in that and subsequent years, and his formal notification to Libby that he regarded the contract as forfeited and would not receive any money from him, Libby was not bound, as a condition precedent, to claim specific performance to go through the useless ceremony of tendering payment at the banking house, etc."

In Hunter *vs.* Daniels, 4 Hare, 420, 433, it was said:

> "The only remaining point insisted upon was that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or, in fact, to call for the benefit of it; and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The general rule in equity certainly was not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been mere form and that the party to whom it was made would have refused to accept the money."

Again, in the case of Moore *vs.* Crawford, 130 U. S. 142, the Supreme Court, speaking of the facts in that case, say:

> "It is true there is no offer to pay the balance of the purchase money, *but the case shows that a tender would have been but an empty show*, and, as the court had it in its power to require payment of the $240 note, thus completing the performance by Monroe, and as it did this by its decree, the allegation would have been merely formal and became immaterial."

Thus, it will be seen from these authorities that a tender is never required where it would be a vain and useless thing, and it is insisted in this case that, there being no executor or administrator to act for all of the parties, it would have been an idle and vain thing to have gone to the caveatees and tendered to them either any real or personal property. The whole record shows conclusively that the caveatees would not have accepted any money or property if the same had been tendered to them, and, as far as the caveat and estoppel are applied to the real property, these caveatees, by the record, did, before any caveat was filed to the will as a will of real property, take affirmative action and ask this

court to probate that will, and, in their petition so asking, declare that caveator is estopped from attempting to prevent their action.

It is therefore insisted that the actions of the caveator, on account of his ignorance, could in no way estop him from contesting the validity of this alleged will, *and that immediately upon his discovering his rights and the facts surrounding the making of the alleged will, he did everything that the law required that he should do, in order to protect his rights.* He accepted no benefits or emoluments under the will after his discovery and he did everything that the law required him to do to repudiate his former conduct as far as the will was concerned. The court below should not have held that on the facts in this case the caveator was estopped, and it committed error in so holding and in peremptorily instructing the jury to return a verdict for the caveatees on this point. Upon an examinatton of the record it will show that the court not only instructed the jury on the issues of estoppel, but went further and instructed them to return a verdict for the caveatees on the other issues, because, as stated by the court in the record, the caveator had no right whatever to give testimony upon these other issues.

We have treated of this proposition in all its phases, although the Court of Appeals in its decision seems to have regarded the question of tender as immaterial. The conclusion of that court, in attempting to draw a distinction between estoppel and election, is hardly warranted by the authorities, for certainly the same rule applies so far as the question of fact and law is concerned, and the criticism of the Court of Appeals of the House of Lords' case and the Massachusetts case is certainly erroneous. The principle of law laid down in those cases is the principle of law that should be invoked here, and if that be so, then the judgment of the Court of Appeals is erroneous.

The attempt on the part of the court to say that the parties could not be placed in statu quo is hardly warranted by

the facts in the case. The fact that the personalty has been disposed of by one of the devisees under the will certainly can not affect the rights of the plaintiff in error. According to his testimony, which testimony is uncontradicted, he had no knowledge of the fraud perpetrated upon him at the time that the personalty was received by the devisee, and he was also ignorant of the fraud at the time that the devisee's personalty was divided under the will of the devisee, and the division was exactly the same as would have been made if there had been neither will of George W. Utermehle nor will of the wife, except that one-third thereof would have gone to the widow. While there are in the record declarations and statements of the parties who attempted to defraud the plaintiff in error, it can hardly be said from the whole evidence in this case that the widow, who took all of the personalty under the will, gave to persons other than her children more than one-third thereof.

It is respectfully submitted that the conclusion arrived at by the Court of Appeals on this question of estoppel is not warranted by the facts in this case nor the law applied to those facts.

Testamentary Declarations.

We next come to consider those assignments of error which set up the refusal of the court to admit certain testimony offered by the caveator. This testimony embraces declarations made by the testator not only some years prior to the making of the alleged will, but down to as late as 1886, a year prior to the making of the alleged will. These declarations were offered to show not only the relationship that existed between the caveator and the devisor, but also the testamentary disposition of the testator as long as his mind was free and untrammeled and not interfered with by undue influence nor clouded by insanity.

The ruling of the court on these questions appears in the record on pages 53 to 56, both inclusive, and involves the

question whether or not testamentary declarations of a devisor are admissible where the issues concern insanity and undue influence. It was contended on behalf of the defendants in error that these declarations come within the ruling of the Supreme Court of the United States in the case of Throckmorton *vs.* Holt, 180 U. S., page 552. In that case the issues involved were forgery and revocation, and the Supreme Court of the United States held that on these issues parol evidence was not admissible, because they could throw no light at all on either issue. The court does go further and intimates that parol evidence is admissible in a case where the issue is insanity, but does not touch upon the question of undue influence. The court, after considering a great number of authorities, say: After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being unsworn declarations, and when no part of the res gestae are not within any of the recognized exceptions admitting the evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

When they are not part of the res gestae, declarations of this nature are excluded because they are unsworn, being hearsay only, and where they are claimed to be admissible

on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they can not be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person to the state of his affections when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the same individual, and his declarations are admitted, *not* as any evidence to their truth, but only because he made them and that it is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false can not be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations.

Thus it is said in Shailer *vs.* Bumstead, 99 Mass. 112, which is one of the cases cited in the margin in class A:

> "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. *The truth or falsity of the statement is of no consequence.*"

The testatrix in the above case died in 1865 at the age of ninety-one, having executed a will in 1851, another in 1853 and a codicil thereto in 1857, and among other issues raised was one of the testamentary capacity. The declarations that were held admissible were only for the purpose of showing "what manner of person she was" who uttered them. They were used to throw the light upon an alleged state of mind which was involuntary and the result of disease and old age. If used for any other purpose they were not admissible, said the court, because they were hearsay and could never be explained or contradicted by the person who uttered them.

The declarations offered in this case were offered for the purpose of showing at the particular time the feelings as expressed by words of the devisor towards the caveator.

It is respectfully submitted that the Supreme Court of the United States had not before it the question of either insanity or undue influence, or the question whether or not you can show the feelings that existed between a devisor and those who should be the object of his bounty, and that wherever issues are raised on these questions these declarations are admissible; for the purpose as far as the issue of insanity is concerned, of not only showing the present condition of the devisor's mind as to his capacity to make a will, but also showing his testamentary intention when he was sane as compared with his testamentary disposition of his property when it is alleged that he is insane, and on the

issue of undue influence, these declarations are admissible to show not only the feelings of the devisor towards the caveator at the particular time, but also to show the testamentary intention of the devisor as long as he was left to his own will and not influenced unduly by another.

In speaking of the admissibility of the declarations of the devisor, the Court of Appeals of Maryland, in the case of Moore *vs.* McDonald et al., 68 Md., where the issues involved were those of insanity and undue influence, say:

> "It has been argued that this promise to Sarah (alluding to a promise to take care of her and her child) having been made really twelve years before the execution of the will, could shed no light on the condition of the testator at the time of its execution; that if he then did intend to support these children, he may have changed his mind, and that even if his wife, or the caveatee, did object, it was merely a family dispute, etc."

In Griffith *vs.* Diffenderffer, 50 Md. 466, this court said:

> "The declarations of the testratrix as to her testamentary intentions, made some months before the execution of the will, were admissible. That such evidence might be offered either to rebut the charge of fraud and undue influence by showing that the will was consistent with the long cherished wishes of the testator, or that it was contrary to well settled convictions of what he thought was a just and proper disposition of his property. It is very clear from this that the declarations of the testator, made before the execution of his will, may be given in evidence by either caveator or caveatee—by the former in order to show that the will is not in accordance with his expressed wishes, and by the latter to show that it is. So in Davis *vs.* Calvert, 5 Gill and Johnson, 269, the court say that the incapacity of the testator may be established by proof of conversations or actions or declarations of the testator, or all of them taken together; also the contents of the will, the manner

of its execution, the nature and extent of the property of the testator; his family connections; their condition and relative situation to him; *the terms upon which he stood with them;* and the claims of particular individuals, are all proper to be shown to the jury upon the question of incapacity. Now, these declarations of the testator, made to his own daughter, and in reference to his grandchildren, certainly show the terms upon which he then stood to them, and that these terms were friendly. Such declarations and expressions, if made a short time before the execution of the will, would undoubtedly have been admissible. But there has not been and can not be any precise time before the execution of the will to which said declarations can be limited. If a testator changed his mind, from other cause than mental incapacity or undue influence, it could be shown by the caveatee. If from incapacity or undue influence, it is on the caveator to show it.

"In this last case inquiry as to the paternity of the childien was allowed to be gone into, which inquiry covered a period of fifteen years."

When it is charged that a will has been executed through undue influence, the declarations of the testator made before its execution are admissible by way of rebuttal to show his intention as to the disposition of his property, because a will made in conformity with such declarations is more likely to have been executed without undue influence than if its terms are contrary to such declarations.

In the case of In re estate of Goldthrop, 94 Iowa, the court held that declarations of testator, both both before and after the execution of the will, as to her feelings towards the contestant, her reasons for not recognizing him in the will, legatee's influence over him, and the disposition he desired to make, are admissible to show undue influence.

See, also, Harp *vs.* Parr, 16 Ill. 470.

Whitney *vs.* Wheeler, 116 Mass. 490.

In the case of Taylor et al. *vs.* Pegram et al., 151 Ill. 106, the court say: It seems that the testator had, before the execution of the present will, made two other wills, one in 1882 and one in 1886. One or two witnesses were questioned as to the testator's statements, made about the time of the execution of these former wills, upon the subject of the manner in which he had therein disposed of his property. It is admitted that the testator was of sound mind and free from the control of any undue influence when he made the former wills. The disposition which he stated in 1882 and in 1886 that he had then made of his property approximated very nearly to the provisions of the will now in contest. This circumstance tended to rebut the idea that undue influence had been exercised to procure the execution of the last will. In this respect, proof of the statements so made by the testator was not objectionable, even if it should be conceded that the time of their utterance was too remote from the time of the execution of the last will to justify their admission for the purpose of establishing mental capacity.

Again, testimony was admitted upon an issue of testamentary capacity, to show the testamentary intentions of the testator when he was of sound mind and memory, where he was suddenly prostrated with severe and fatal illness and during which he executed a codicil to his will. The court held it was proper to show the consistency of the will with the natural inclinations and previous declared intentions of the testator.

Hammond *vs.* Dyke, 42 Minn. 272.

It will thus be seen from these authorities that the declarations offered in evidence in this case tend to show the state of mind of the devisor at the time they were made, and were therefore admissible in evidence, and that the court committed error in refusing to permit such evidence to be offered.

Counsel for the defendants in error, in their brief in the Court of Appeals, contended that plaintiff in error was prohibited from filing his caveat on account of section 10 of the act of June 8, 1898 (30 Stat., p. 437), which said section is as follows:

> "SEC. 10. That the record in the office of the register of wills for the District of Columbia of a duly certified copy, or transcript of the record of proceedings, admitting any will or codicil to probate outside of the District of Columbia; and the record in said office of any will or codicil heretofore admitted to probate in said District, and which shall not have been annulled or declared void according to law prior to the passage of this act, shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act: *Provided*, That the provisions of this section shall not apply to any proceedings at law or in equity pending at the date of the passage of this act, or commenced within one year after the passage of this act, wherein or whereby the validity of such will or codicil is or shall be called in question."

An examination of this section will show that it does not apply to a direct attack on a will in the probate court, but was enacted for the purpose of preventing after a certain period an attack on wills in the equity and common law courts. This is fully demonstrated not only by an examination of the whole of said act of Congress, but by the wording of the section itself. The act of Congress here referred to provided in numerous sections for the reprobating of wills and codicils in the probate court, the probating thereof prior to said act not being sufficient to pass real estate. Section 10 was added thereto in order to prevent a collateral attack from being made on these old wills in the courts of common law and equity, and said section has nothing what-

ever to do with the probate court. The act, speaking of these old wills, says:

> "Shall be deemed and held, at law and in equity, as of the same and like force and effect as if such will or codicil had been duly proved and admitted to probate and record under and in accordance with the provisions of this act."

And in the proviso it is enacted that the section shall not apply to any proceedings at law or in equity pending at the date of this act or commenced within one year thereafter, and nothing whatever is said about the probate court. The statute is merely a statute regulating evidence in courts of law and equity; it was not in effect at the time of the trial of this case, being repealed by the Code. For these reasons and for the further reason that no action was ever taken thereon in the court below, it can not be considered as in any way affecting the rights of the plaintiff in error.

In view of the facts developed by the record, including the testimony given and offered, we respectfully submit that the Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia and that the justice of that court erred in directing the jury to return a verdict upon the issues of estoppel, and that he erred in directing the verdict upon the remaining issues, especially in the face of the direct testimony which was offered to prove the absolute mental unsoundness of the testator and the positive existence of undue influence in the procurement of the alleged will, and that error was also committed by the trial court in the rulings contained in this record in regard to the non-admission of testimony offered, and that for these reasons the decree rendered herein shoul be reversed and the cause remanded to the Court of Appeals, with direction to them to reverse their judgment and remand the cause for trial.

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